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MAKING SENSE OF THE ELEVENTH AMENDMENT: INTERNATIONAL LAW AND STATE SOVEREIGNTY

Thomas H. Lee*

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Eleventh Amendment to the Constitution
of the United States of America

INTRODUCTION

For some time, no one has argued that the Eleventh Amendment means what it most plainly seems to say—that it prohibits federal jurisdiction as to “any suit in law or equity” brought against a State “by Citizens of another State, or by Citizens or Subjects of any Foreign State.”¹ Since 1890, the fatal critique of a literal reading of the Amendment has been that it makes no sense (“anomalous . . . startling . . . unexpected”) to read the Constitution as debarring federal jurisdiction over suits against a State brought by citizens of other States or foreigners, but, apparently, not citizens of that State.² The

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¹ See *Alden v. Maine*, 527 U.S. 706, 727–30 (1999); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 516 (1977) (“[T]he eleventh amendment is universally taken *not* to mean what it says.”). See generally RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1047–58 (4th ed. 1996) [hereinafter HART & WECHSLER] (summarizing the history surrounding the passage of the Amendment and debates about its meaning); CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 3–40 (1972) (discussing pre-Eleventh Amendment sovereign immunity history and doctrine).

² *Hans v. Louisiana*, 134 U.S. 1 (1890).

It is true, the amendment does so read . . . [but] then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state If this is the necessary consequence of the language of the Constitution and the law, the result is no less startling and unexpected than was the original deci-

Supreme Court has more recently diverged from the Amendment's literal language by extending the proscription on federal jurisdiction to suits against the States in admiralty³ and such suits brought by foreign states rather than just their citizens or "subjects,"⁴ even though the Eleventh Amendment mentions only suits "in law or equity,"⁵ and leaves untouched Article III's grant of judicial power as to "controversies . . . between a State . . . and foreign States."⁶

This Article introduces a new theory of the Eleventh Amendment's meaning that explains its seemingly puzzling language as evincing the Framers' purposive decision to incorporate into the Constitution, in recognition of the sovereign equality of the States, the classical international law rule that only states have rights against other states. The Amendment is essentially just a negative formulation of the affirmative international rule,⁷ namely, a foreign citizen may not sue a sovereign state. To permit such a suit would imply that a foreign citizen or a subject who is at most a fragment of the sovereignty of his own state was the equal of a sovereign state made up of many citizens, or, if a monarchy, its king and subjects. Read through the interpretive lens of this international law theory, the forty-three words of the Eleventh Amendment, carefully chosen and debated in every state legislature over a five-year period, make sense. And the theory in turn makes sense because the founding generation was not only familiar with contemporary international law but also frequently consulted it in matters of statecraft. It is unsurprising, then, that the Founders would turn to the settled law of nations for guidance in deciding the domestic law issue of who has standing to sue a State in interstate and international suits brought in federal court. The Amendment says nothing about suits against States brought by foreign states because such suits would be consistent with the sovereign equality principle, presuming no difference between the sovereign dignity of a State and a nation-state, a powerful statement in itself about the sovereign dignity of the American states. And because the Amendment was intended, like the international law rule, to govern only interstate or international disputes between private parties and States, it logically makes no statement about the rights of citizens to sue their own States

sion of this court, that under the language of the Constitution and of the judiciary act of 1789, a State was liable to be sued by a citizen of another State, or of a foreign country.

Id. at 10.

³ *Ex parte New York*, No. 1, 256 U.S. 490, 501-02 (1921) (holding that Eleventh Amendment bars in personam admiralty jurisdiction in a suit brought by private parties against New York). *But see* *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 494-95 (1998) (holding that Eleventh Amendment does not bar in rem admiralty suit against California where the State does not possess the res).

⁴ *Principality of Monaco v. Mississippi*, 292 U.S. 313, 331-32 (1934).

⁵ U.S. CONST. amend. XI.

⁶ U.S. CONST. art. III, § 2.

⁷ Article 34 of the Statute of the International Court of Justice provides an example of an affirmative statement of the rule: "Only states may be parties in cases before the Court." STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Art. 34.

in federal court.

The argument for a literal interpretation of the Eleventh Amendment has been made before on the theory that limiting the bar on suits against States to suits brought by citizens of other States and foreigners was an attempt to write the Amendment narrowly to deal with particular political problems. Professors Lawrence Marshall and Calvin Massey have argued separately that the Amendment is phrased as it is to deny access to federal court to English and other out-of-state private creditors seeking to enforce revolutionary war debts and property claims against the States.⁸ Marshall claims that by curtailing these sorts of suits, the Amendment was more broadly intended to preserve interstate and international peace; Massey would ground a conditional sovereign immunity (similar to what is proposed in this Article) on the Tenth Amendment instead.⁹

The problem with these explanations may be their reliance on short-sighted pragmatism as principal motive—the theories are unappealing because it is unappealing to think that the Framers would amend the Constitution just to avoid the States' having to pay war debts to out-of-state private parties.¹⁰ As Professor Massey put it, “[a] rule that permits the states to violate the federal rights of noncitizens and avoid direct accountability in federal court for those actions seems most peculiar, indeed, almost perverse”¹¹ and seems explicable only as an “unflinchingly political” decision¹² to shut out British creditors and Loyalists seeking to reclaim their property. Far more attractive is the notion that the Eleventh Amendment is a grand statement about the sovereign dignity of States,¹³ or a sober, prescient restriction on open-ended diversity jurisdiction.¹⁴ Since the historical evidence seems

⁸ Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1356–71 (1989); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 117 (1989).

⁹ Massey, *supra* note 8, at 143–45. The Tenth Amendment, enacted as part of the original Bill of Rights in 1791, states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. Others have also made this argument, but there is little to no evidence that the founding generation perceived the Tenth Amendment in this way. As discussed *infra*, the Republican Government Clause may have been drafted to perform the function that Professor Massey imputes to the Tenth Amendment.

¹⁰ One could argue that the theory might be supported by more admirable, less pragmatic motives, e.g., cautiousness in the drafting of a constitutional amendment, a reluctance to involve the federal courts in fractious disputes between a private noncitizen party and a State, but while its advocates have made these points, see, e.g., Marshall, *supra* note 8, the centerpiece of their argument has been the out-of-state situs of private creditors.

¹¹ Massey, *supra* note 8, at 67.

¹² *Id.* (citing John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 2003 (1983)).

¹³ See, e.g., *Bd. of Trustees v. Garrett*, 531 U.S. 356, 363 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669–70 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996).

¹⁴ See, e.g., *Alden v. Maine*, 527 U.S. 706, 760 (1999) (Souter, J., dissenting); *Seminole Tribe*, 517 U.S. at 101–02 (Souter, J., dissenting); see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96

inconclusive as among the existing theories,¹⁵ it is not surprising that the latter two theories ground the orthodox and leading heterodox interpretations of the Eleventh Amendment, despite the avowed preference for literal language of leading members of both camps.¹⁶

This Article is an attempt to breathe new life into the literal interpretation of the Eleventh Amendment by justifying it with a new, principled theory. In so doing, it combines elements of both the orthodox ("federal-question immunity") and heterodox ("diversity") theories. The international law theory shares with the federal-question immunity interpretation the notion that the Amendment was intended to protect the dignity of the States' sovereignty (though how it defines the implicated dignity interest is different), and, with the diversity theory, the idea that the Amendment addresses a problem unique to the interstate context—a problem that is posed only when the plaintiff is a citizen of another State or a citizen or subject of a foreign state. There are also important differences from each; the international law theory most significantly departing from both in its faithfulness to the literal language, because the threat to the sovereign dignity of the States that the Amendment addressed in precise and unambiguous language was posed uniquely by recognizing legal claims brought by citizens or subjects of foreign or other American states and not the States themselves. And, as important, the theory seems a better fit to *all* of the historical evidence.

What makes the international law explanation a new theory notwithstanding predecessor literal theories and the common themes shared with the federal-question immunity and diversity theories is the premise that the Amendment represents the application of international law principles to solve the domestic problem of state sovereignty. The argument is not that the drafters of the Amendment understood international law as substantively binding with respect to the question of whether (and when) States may be sued by private parties—this question was clearly understood as a domestic problem to be controlled by the laws of the United States. Rather,

YALE L.J. 1425, 1427 (1987); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989) [hereinafter Fletcher, *The Diversity Explanation*]; William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1071–72 (1983) [hereinafter Fletcher, *A Historical Interpretation*]; Gibbons, *supra* note 12, at 1891–94; Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988).

¹⁵ See JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 28 (1987) ("The search for the original understanding on state sovereign immunity bears this resemblance to the quest for the Holy Grail: there is enough to be found so that the faithful of whatever persuasion can find their heart's desire.").

¹⁶ Compare, e.g., *Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038, 2043 n.1 (2001) (Scalia, J.) (using Webster's Dictionary to define "search" for Fourth Amendment purposes), with Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 748, 748–49 (1999) (urging an approach to constitutional interpretation that considers a term or phrase in the context of its other uses in the Constitution).

it is that the Founders understood the States as sovereign entities bound together in an interdependent coexistence very much like the community of nations, and they therefore frequently consulted international law and political theory to craft rules conducive to a peaceful and mutually respectful coexistence. That insight, applied here to make sense of the careful words of the Eleventh Amendment, may prove useful more generally to understand other constitutional doctrines considered domestic in nature.

In terms of goals, then, this Article seeks first, to answer the historical question of why the Eleventh Amendment reads as it does and in so doing to present the case for interpreting the Amendment literally as a matter of law. But that is not to say that the goal is to return the doctrine ahistorically to that literal language; as Part IV will explain, the international law theory's vision of what the doctrine should be lies somewhere between the federal-question immunity and diversity theories, owing to important developments subsequent to the passage of the Amendment. There is, however, a second purpose, which concerns general techniques of constitutional interpretation, applied here to a case study of the Eleventh Amendment. Regardless whether one finds the explanation of the Amendment persuasive or not, the background point is to show how the founding generation borrowed from the law of nations to address issues of constitutional federalism (certainly a far more useful compass in this respect than English common law) in their statebuilding project.¹⁷ The idea that important, "domestic" aspects of American constitutional law have roots in international law has been almost entirely neglected by judges, lawyers, and constitutional scholars.

This Article has five parts. Part I introduces the international law the-

¹⁷ The historical American statebuilding project was not unlike the contemporary process by which formerly autonomous nation-states have constructed an increasingly centralized political, economic, and social system in Europe. More specifically, the process of building a suprastate judiciary presages the rise of "supranational" courts such as the European Court of Justice and the European Court of Human Rights. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 280-84 (1997). As a general matter, the distinction between national and international law was not as rigid in the late eighteenth century, particularly for thirteen ex-colonies who were insecure about their status in the society of nations and thus predisposed to a robust law of nations to reinforce their status as equal sovereigns, collectively or individually, vis-à-vis more powerful and storied nations. On a domestic level, emphasizing the compulsory nature of the law of nations was useful as an analogy to ensure obedience by the American states to the laws of the untested "general government." Cf. Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 824-25 (1989) ("Notwithstanding the controversy that would erupt in the 1790s over the extent to which the common law formed the basis for the law of the national government, writers generally asserted that the law of nations was part of the law of the new American states and their national government.") It is not surprising, then, that the young republic was one of the most vociferous proponents of the binding nature of international legal obligations, going so far as to include among Congress's enumerated functions, the responsibility "[t]o define and punish . . . Offenses against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10; see also 1 Op. Att'y Gen. 26, 27 (1792) (Attorney General Edmund Randolph) (declaring the law of nations to be binding on the United States although it was "not specially adopted by the Constitution or any municipal act").

ory and compares it to the other theories of the Eleventh Amendment. Part II explains why it was logical for the founding generation to turn to international law and norms for insights into domestic federalism issues and presents evidence tending to show that important figures in the origins of the Eleventh Amendment were influenced by international law on the specific issue of the States' sovereignty. Part III lays out the evidence for the various theories and proposes that the international law theory is the most consistent with all of the evidence. Part IV discusses the Fourteenth Amendment's effects on the doctrinal prescriptions of the international law theory and indicates the areas in which the theory, thus amended, suggests that the current doctrine should be modified. Part V concludes by emphasizing again the complex perspective of the founding generation, specifically, their willingness to consult international law to solve difficult questions of federalism, and counsels a similar open-mindedness today.

I. THEORIES OF THE ELEVENTH AMENDMENT

A 5-4 majority of the current Supreme Court decisively rejected the diversity explanation of the Eleventh Amendment in the landmark decision of *Seminole Tribe v. Florida*,¹⁸ in favor of the "federal-question immunity" theory articulated in *Hans v. Louisiana*.¹⁹ The *Seminole Tribe* majority read the Amendment as immunizing the States from all private suits in federal court (whether brought by in-state citizens or out-of-state private parties), regardless of the basis for subject matter jurisdiction most notably, even if the private suit alleged a federal question.²⁰ The current doctrine also recognizes that this sovereign immunity, though constitutional in nature, may be waived by the States or abrogated by Congress when it has properly and explicitly authorized private causes of actions for money damages against the States to enforce the Fourteenth Amendment. This Part explains the international law theory, as well as the federal-question immunity and diversity theories, in greater detail.

A. *The International Law Explanation*

The classical law of nations imposed duties and conferred rights only upon sovereign states.²¹ A sovereign state, in turn, was made up of citizens,

¹⁸ 517 U.S. 44 (1996).

¹⁹ 134 U.S. 1 (1890).

²⁰ 517 U.S. at 72-73.

²¹ See WHEATON'S ELEMENTS OF INTERNATIONAL LAW 34 (5th English ed. 1916) ("[T]he subjects of international law are, properly speaking, only States,—for they alone are vested with international personality.") [hereinafter WHEATON]. The general rule still applies, but there has been growing recognition of private rights in international law, most notably, in the European Court of Justice and the European Court of Human Rights, in which individuals can bring suits against any of the member European states. See Helfer & Slaughter, *supra* note 17, at 277 ("Although both tribunals have the power to adjudicate state-to-state disputes—the province of traditional international adjudication—each has compiled a more successful compliance record in cases involving private parties litigating directly against state

if a republic, or its king and his subjects, if a monarchy.²² The fact that the drafters of Article III and the Eleventh Amendment felt the need to distinguish between “Citizens” and “Subjects” of foreign states indicates the extent to which the founding generation was similarly attuned to comparative distinctions in forms of domestic political sovereignty. But each sovereign state was the equal of any other in the society of states regardless of its form of government, size, population, or power.²³ The atomized individual was therefore a nonentity with no rights or duties so far as the law of nations was concerned, and to recognize the rights of a citizen or subject of one state against a foreign state (even if that state were to consent to the private rights) would imply that a fraction of the sovereignty of one state was equal to the full sovereignty of another.²⁴ This would belittle the sovereign dignity of the latter state in the society of nations and pose a threat to the society itself by impeaching the irreducible equality and dignity of the sovereign state, its sole constituent unit. Emmerich de Vattel, the leading writer on international law of the time, put it this way:

Every nation, every sovereign and independent state, deserves consideration and respect, because it makes an immediate figure in the grand society of the human race, is independent of all earthly power, and is an assemblage of a great number of men who are, doubtless, more considerable than any individual. The sovereign represents his whole nation, he unites in his person all its majesty. No individual, though ever so free and independent, can be placed in competition with the sovereign; this would be to put a single person alone upon an equality with an united multitude of his equals. Nations and sovereigns, are then, at the same time under an obligation, have a right to maintain their dignity, and to cause it to be respected as of the utmost importance to their safety and tranquility.²⁵

It is one thing to say that the law of nations recognized only duties and obligations between sovereign states as an extension of the sovereign equality principle; but as there were no international courts in the eighteenth century, international law could provide no answer to the specific question whether only a sovereign state could sue another state in a court invested with the judicial power to decide interstate disputes. This is a different question from whether a state might sue another sovereign state in its own courts—it was settled under the law of nations that it could not.²⁶ Certainly,

governments or against each other.”).

²² WHEATON, *supra* note 21, at 34–35.

²³ *Id.* at 261.

²⁴ Of course, the one exception would be a monarch, in which “the person of the prince is necessarily identified with the State itself: ‘l’État c’est moi.’” *Id.* at 34.

²⁵ EMMERICH DE VATTEL, *THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 208–09 (Northampton, Mass., Simeon Butler, 4th Am. ed. 1820) (1758) (Book II, Ch. III, § 35).

²⁶ See *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 145–46 (1812); James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 582–

standing to sue was reserved exclusively for states once formal international courts were set up in the twentieth century.²⁷ But even earlier, the ad hoc arbitral tribunals established by treaties to resolve reparations and boundary disputes were limited to the claims of sovereign states against other sovereign states. And while much might have changed in the world and in the law of nations in the two centuries between the drafting of the Eleventh Amendment and the establishment of the first true international court, the sovereign equality principle remained constant.

Considerations of sound policy in international relations provided further justification for the sovereign equality principle and the resultant rule of limiting standing in interstate disputes against sovereign States to other States-parties. Because a sovereign state aggregated the preferences of many citizens for the good of the state, the more extreme and trivial legal claims of individuals aggrieved in their dealings with foreign states could be filtered and mitigated through the domestic political process. Moreover, sovereign states could resort to a range of political and diplomatic measures besides lawsuits, and they could be counted upon to think strategically about the merits of pursuing a claim versus countervailing costs to valuable political and economic relationships that might be jeopardized. For instance, pursuing a suit against another state concerning defaulted debt obligations might invite similar claims in the future against the plaintiff state. The end result would be that state-to-state lawsuits would be relatively rare and confined to issues that were more national than individual in character.

A pertinent corollary to the sovereign equality principle was the long-standing international law doctrine of espousal. Justice Iredell, author of the dissent in the Supreme Court case that prompted enactment of the Eleventh Amendment and a great admirer of the law of nations, described the doctrine in 1796, during the heart of the Amendment ratification debates as follows:

When any individual, therefore, of any nation, has cause of complaint against another nation, or any individual of it, not immediately amenable to authority of his own, he may complain to that power in his own nation, which is intrusted with the sovereignty of it, as to foreign negotiations, and he will be entitled to all the redress which the nature of his case requires, and the situation of his own country will enable him to obtain.

....

Miserable and disgraceful indeed, would be the situation of the citizens of the United States, if they were obliged to comply with a treaty on their part, and had no means of redress for a non-compliance by the other contracting power.

But they have, and the law of nations points out the remedy. The remedy

84 (1994).

²⁷ STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Ch. II Art. 34.

depends on the discretion and sense of duty of their own government.²⁸

We could as easily call this an exception rather than a corollary, but regardless of how convincing the fiction is, the doctrine posits that an individual's claims, once espoused by his state, are national, not personal, in nature—it is the espousing state asserting the right, and so the claim is recognized by the law of nations.²⁹

An important question arises as to the scope of the rights of citizens and subjects *within* each sovereign state. As a formal matter, this was a question for domestic law and political theory³⁰ but, as a practical matter, Enlightenment thinkers considered it deeply relevant to international law for three reasons. First, given the lack of a centralized enforcement authority in the international system, the classical law of nations was justified by its advocates as the embodiment of the law of nature.³¹ As Vattel put it, “the law of nations is originally no more than the law of nature applied to nations.”³² The rights of individuals in domestic society were also defended at that time by reference to the law of nature, and being natural law enthusiasts, international law philosophers were favorably disposed to domestic forms of government that protected individual rights.

Second, and in a related vein, because individuals had no rights (or, more accurately, did not exist) as between sovereign states in the law of nations, the normative appeal of an international society for anyone who cared about individual rights at all was enhanced by the proliferation of states in which such rights were recognized domestically. In other words, the non-status of the individual citizen or subject in the international sphere made it that much more imperative to advance his recognition within the sovereign state. Otherwise, the law of nations might be used to perpetuate a system of repressive sovereign states in which, ironically, princes would aggrandize

²⁸ *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 259–60 (1796) (Iredell, J., concurring).

²⁹ See *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. A) No. 2, at 12.

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.

Id.

³⁰ See VATTEL, *supra* note 25, at 65–66 (Bk. I, Ch. III, § 29) (“It is not our business particularly to consider, what ought to be this constitution, and these laws; this discussion belongs to public laws and politics.”).

³¹ See SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* [Eight Books on the Law of Nature and of Peoples] (1688 ed.), Bk. I, Ch. II, §§ 1–2. But see Richard Tuck, *Natural Rights and Empire* (manuscript on file with author) (concluding that Thomas Hobbes formulated the idea of the lawless “state of nature” upon which he grounded his proto-liberal domestic political theory from the same interaction of sovereign nations that led Hugo Grotius and Pufendorf to theorize about the harmonious law of nations).

³² VATTEL, *supra* note 25, at 48 (Preliminaries § 6).

personal power at the expense of the common welfare that justified the creation of states in the first place.

Third, and most importantly, to the extent that representative governments were believed to be less likely to go to war than despotic regimes where subjects had no choice but to do the state's (that is, the prince's) will, an international society of representative sovereign states was more likely to be cooperative and free of conflict.³³ As Immanuel Kant reasoned, in a representative state, the decision to go to war would be made by the citizens who would be doing the fighting and dying rather than by the prince, who could decide to go to war without risk to his own life; this would logically lead to fewer, more carefully considered decisions to go to war.³⁴

Thus, international law scholars of the late eighteenth century surmised that the effectiveness of the law of nations depended to a considerable degree on the proliferation of sovereign states that recognized individual rights—states, loosely speaking, that possessed the “republican form of government.”³⁵ Just what constitutes the republican form of government is a difficult question of political theory; it suffices for our purposes to say that sovereignty in a republic reposes in equal and free citizens, and that the state is always subject to the republic's fundamental laws, which correspond to the terms of the citizenry's original consent to be governed. In a monarchy, by contrast, the prince is the state and thus the state is, by defini-

³³ See IMMANUEL KANT, *PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY AND MORALS* 113 (Ted Humphrey trans., Hackett Publ'n Co. 1983) (1795) [hereinafter KANT, *PERPETUAL PEACE*].

[T]he republican constitution also provides for this desirable result, namely, perpetual peace, and the reason for this is as follows: If (as must inevitably be the case, given this form of constitution) the consent of the citizenry is required in order to determine whether or not there will be war, it is natural that they consider all its calamities before committing themselves to so risky a game. (Among these are doing the fighting themselves, paying the costs of war from their own resources, having to repair at great sacrifice the war's devastation, and, finally, the *ultimate evil* that would make peace itself better, never being able—because of new and constant wars—to *expunge the burden of debt*.).

Id. (emphasis added). Kant, writing in 1795 between the drafting and the ratification of the Eleventh Amendment—a contemporary of the same Western intellectual culture if not personally known to the founders—has postulated an inverse relationship between *sovereign debt* and republican government. It seems not altogether unlikely that the Founders might have reasoned similarly—that they believed that representative republican governments in the States would decrease not only interstate friction generally, but also, specifically, ballooning sovereign debts and subsequent defaults that were the overwhelming source of private lawsuits against the states by both citizens and foreigners. For a modern version of the Kantian “democratic peace” theory, see BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD* (1993). For an exposition of “liberal” international relations theory that systematizes the Kantian insight concerning the causal significance of domestic regime types in determining outcomes in the international system, see Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 530–33 (1997).

³⁴ See KANT, *PERPETUAL PEACE* *supra* note 33, at 112–15.

³⁵ See *id.*; see also VATTEL, *supra* note 25, at 63 (Bk. I, Ch. II, § 24) (“An admirable constitution [in England] places every citizen in a situation that enables him to contribute to [national flourishing.] . . . Happy constitution! which they did not suddenly obtain; it has cost rivers of blood; but they have not purchased it too dear.”).

tion, immune to the claims of right or law of subjects,³⁶ but for moral claims on sovereign grace.

This normative projection of republican values into domestic politics constituted an important eighteenth-century gloss on the traditional law-of-nations principle of sovereignty as set forth by Hugo Grotius. The traditional Grotian principle assumed the equality of sovereign states in international society regardless of the form of internal government, and, by virtue of the fact that only states are vested with international "personality," made no statement about the rights of private individuals against the states.³⁷

But Enlightenment political theory was indeterminate as to the specific question whether the republican form of government endorsed the right of citizens to *sue* the sovereign state to compensate for transgressions of individual rights. Certainly, at the most general level, the possibility that the sovereign, even in a republic, might break the terms of its *social* contract with its citizens was contemplated, and divergent opinions formed on the legitimacy of various forms of citizen action in response—most spectacularly, revolution.³⁸ Even Kant, who for the most part seems to have believed that the citizens in a republic were stuck with the terms of the social contract they had struck, seems to have been aware of, and concerned about, the potential for the sovereign to interfere with fundamental individual rights through, for example, its powers of taxation and eminent domain.³⁹ Vattel gave voice to such concerns: "In all well-regulated states, in countries that are really states, and not the dominions of a despotic prince, the ordinary tribunals decide the causes in which the sovereign is concerned, *with as much freedom as those between private persons*."⁴⁰

Vattel took pains to warn that the sovereign was not entitled to any special immunity or treatment in the courts, especially with respect to mat-

³⁶ See KANT, *PERPETUAL PEACE* *supra* note 33, at 112.

The sole established constitution that follows from the idea of an original contract, the one on which all of a nation's just legislation must be based, is republican. For, first, it accords with the principles of the *freedom* of the members of a society (as men), second, it accords with the principles of the *dependence* of everyone on a single, common [source of] legislation (as subjects), and third, it accords with the law of the equality of them all (as citizens).

Id.

³⁷ See Hugo Grotius, *DE JURE BELLI, AC PACIS LIBRI TRES* [Three Books on the Law of War and of Peace] (Francis W. Kelsey trans., Oxford Clarendon Press 1929) (1623–24), Bk. 1 ch. 3 § 8 cl. 2.

Just as, in fact, there are many ways of living, one being better than another, and out of so many ways of living each is free to select that which he prefers, so also a people can select the form of government which it wishes; and the extent of its legal right in the matter is not to be measured by the superior excellence of this or that form of government, in regard to which different men hold different views, but by its free choice.

Id.

³⁸ See, e.g., THOMAS HOBBS, *LEVIATHAN* 254 (R. Tuck ed., Cambridge Univ. Press 1996) (1651); KANT, *PERPETUAL PEACE*, *supra* note 33.

³⁹ IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* §§ 2–4 (John Ladd trans., Bobbs-Merrill Educ. Publ'n 1965) (1797).

⁴⁰ VATTEL, *supra* note 25, at 136 (138 in 1805 edition) (Bk. I, Ch. XIII, § 164) (emphasis added).

ters concerning revenue, and that, consequently, the sovereign's role should be limited to maintaining and executing the judgments of domestic courts.⁴¹ At the same time, he qualified that the sovereign should only be held accountable for violations of *fundamental* laws, and not of *political* laws, in order to ensure an administrable government.⁴² He is not exactly clear about what laws were "fundamental"—we need not, for one, presume that they must be congruent with a written constitution. At the very least, they included laws relating to the state's structure and operation, for example, the prohibition of monarchy, equal rights of citizens to vote, or separation of powers—violations of which by definition undermine the republican form of government. These violations, to be sure, could be remedied without private causes of action for money damages; but there are violations of individual rights that Enlightenment liberals would consider "fundamental" which would seem to require such a remedy—for instance, taxation without representation or the taking of private property without just compensation. The most that can be said, then, about the suability of a sovereign state by its own citizens in its own courts from an international law perspective is that it was hoped such suits would be permitted, but it was perceived as a matter to be decided by the state pursuant to its form of government, and that the republican form of government was consistent with sovereign suability for fundamental violations.

This is different from the question (hypothetical until the twentieth century) whether a sovereign state might be sued by its own citizens for a violation of the law of nations in an *international* court. For one, the sovereign equality principle would not be a *per se* bar to this suit because an individual (at least, a citizen in a republic) does have a claim on the sovereignty of his own state, if not on the sovereignty of another. There is another difficulty, however. Under the traditional law of nations, the claim of a citizen against his own state was necessarily one of domestic, not international, law and hence could not even present the issue of standing before a general court.⁴³ But under modern international law, individuals do have rights against their own states for especially heinous acts (genocide and torture come to mind) that offend humanity.⁴⁴ If an individual might state a claim under international law against his state, then, the question whether

⁴¹ See *id.* at 137 (139 in 1805 edition) (§ 167); see also *id.* at 136 (138 in 1805 ed.) (§ 164).

The establishment of courts of justice is particularly necessary, to decide the causes relating to the revenue; that is, all the disputes that may arise between those who are employed in behalf of the prince and the subjects. It would be very unbecoming, and highly improper for a prince, to resolve to be judge in his own cause; he cannot be too much on his guard against the illusions of interest and self love

Id.

⁴² See *id.* at 65 (§ 29).

⁴³ Cf. Helfer & Slaughter, *supra* note 17, at 277.

⁴⁴ See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring); RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 702 (1982).

an international court should decide that claim would necessarily turn on the extent to which the state is understood to have ceded its internal sovereignty—its exclusive power to govern within its borders—to the international court.

A hypothetical may help to demonstrate how these international law principles explain the words of the Eleventh Amendment. Imagine that a baker's dozen of young, weak sovereign states unite to fight a common foe and to preserve peace as between each other. In so doing, a balance is struck between powers the states must necessarily give up to act as one nation vis-à-vis nonunited states ("external sovereignty") and the powers and status the united states retain within their territories and vis-à-vis the other united states ("internal sovereignty"). They therefore cede important powers to newly established general government institutions, including a court with the judicial power to decide, among other things, disputes between the united sovereign states and between those united states and nonunited sovereign states.

Imagine, then, that the court construes the judicial power to extend to a suit brought by a citizen of one of the united states against another of the states. Such a suit among the united states clearly does not implicate external sovereignty vis-à-vis foreign states; nor would a suit brought by a foreign citizen or subject who has no rights under the law of nations. But in light of the traditional international law rule that only sovereign states have rights against sovereign states, would not allowing the general judicial power to be used in this way denigrate the sovereignty of the state being sued? The Eleventh Amendment seems carefully phrased to answer precisely this question: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State." The answer logically says nothing about the case that is not presented, that of suits filed by "Citizens of the State."

While the Amendment faithfully adopts the traditional international law rule to decide the interstate case, the specific issue at the heart of the interpretive question is complicated by a variation. To illustrate, return to the hypothetical and assume that one hundred years after the first suit, there is a second suit, this time brought by a citizen of one of the united states against his own state in the general court, and that the suit alleges a claim under the joint laws of the united states (that is, a federal question, nondiverse suit like *Hans v. Louisiana*). Twenty-five years before the second suit, the union experienced a failed attempt at secession by a number of states that resulted in a strengthening of the union at the expense of the internal sovereignty of the individual united states.

In deciding whether the court ought to be able to hear *this* case, the rulemaker is confronted with a choice grounded in how he chooses to characterize the laws of the united states. In light of the challenge to and ultimate reaffirmation of the union, one might say that the laws of the united

states have thereby assumed the cast of unitary national laws, directly binding on all citizens of the united states, without distinction as to their state citizenship. From this perspective, a violation of these laws by one of the states would be actionable in the courts of the united states by a citizen of that state as it would be by a citizen of any of the united states. A rule that would afford such jurisdiction privileges the general government to make laws that trump state power even where the only parties to the dispute are one of the united states and one of its citizens, necessarily diminishing the exclusive sphere of that state's internal sovereignty.

Or, one might downplay the effect of the threat and survival of the union, and argue that, notwithstanding the fact that the laws of the united states have been violated, the general court still lacks the power to decide cases where those general laws overlap with the internal sovereignty of the states, which, in this important respect, has been left intact in the course of events. Viewed in this light, it is plain to see that the issue no longer turns on the sovereign equality principle used to decide the first case involving a suit against a state by a noncitizen of the state, but rather on the constancy of the states' internal sovereignty.

The second conclusion would not have been one reached by the original rulemakers if they were receptive to the Enlightenment international law perspective, putting aside for the moment the fact that the first case (a suit against a state by a noncitizen) did not present this more difficult issue. As already discussed, the notion of absolute sovereign immunity, even for violations of fundamental laws, was at some level inconsistent with the political theory of republican government, and while this was an issue primarily for domestic courts, it would still have been problematic to make such a statement as to state sovereign immunity in the general court. Also, to add the additional proscription against suits by own-state citizens, even if it were correct as a matter of the law of nations at the time (which recognized no legal claims by a citizen against his own state), would convert the original rule from a statement about the dignity and equality of sovereign states as aggregations of peoples to a statist assertion on the power of the state as against mortals within its borders.

This, in a nutshell, is the international law theory of the Eleventh Amendment—the crucial insight being the notion that its drafters perceived the States, in some respects (here, immunity from the claims of citizens or subjects of other States or foreign states), as equivalent to sovereign states in the society of nations. This is a very different concept of the States' dignity interest that is implicated in private suits in federal court than that articulated by advocates of the federal-question immunity theory. To claim that the Amendment stands for the proposition that the States are endowed with a constitutional immunity from suit by *any* private parties unduly confuses the sovereign equality principle that undergirded the Eleventh Amendment's enactment (a response to a Supreme Court decision permitting a suit against a State by a citizen of another State) with a respect for

exclusive state power vis-à-vis citizens in its sphere of internal sovereignty—a concept that was both diminished and discredited by the Civil War. As we will discuss later, it is this nineteenth-century historical event, not anything to do with the original meaning of the Eleventh Amendment, that leads to the conclusion shared in part by the diversity theory that all citizens of the United States (but not citizens or subjects of foreign states) should be understood to have a right to sue the States in federal court for constitutional and certain other federal statutory violations. The next subpart turns, then, to the existing explanations of the Amendment.

B. *The Federal-Question Immunity Explanation*

There is already a very thorough literature explaining, defending, and attacking the federal-question immunity and diversity theories of the Eleventh Amendment.⁴⁵ This subpart therefore sketches only briefly the relevant background, leaving interested readers to consult the literature as desired. To understand the two theories, it is necessary to start with Article III, the construction of which the Eleventh Amendment purported to narrow. Article III relevantly provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States; and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.⁴⁶

The Eleventh Amendment's clarification was enacted to overturn the Supreme Court's decision in *Chisholm v. Georgia*, which quite reasonably⁴⁷ read Article III and the relevant statute (section 13 of the Judiciary Act) to support its original jurisdiction over the case.⁴⁸ Alexander Chisholm, a South Carolina citizen, had sued the State of Georgia to compel it to make payments due to him as executor to the estate of a South Carolina merchant who had contracted to provide supplies to Georgia during the Revolution.⁴⁹

⁴⁵ See, e.g., sources cited *supra* notes 13, 14.

⁴⁶ U.S. CONST. art. III, § 2.

⁴⁷ See *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (Harlan, J., concurring) ("I am of opinion that the decision in [*Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793),] was based upon a sound interpretation of the Constitution as that instrument then was."); see also *Gibbons*, *supra* note 12, at 1895 ("Certainly from a textual standpoint, the suggestion that states were immune from suit in federal court seems posterosus on its face in light of the express provision in article III . . .").

⁴⁸ "In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction." U.S. CONST. art. III, § 2, cl. 2.

⁴⁹ See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

Affirming its jurisdiction, the Court, by a four to one vote,⁵⁰ ordered a default judgment entered against Georgia if it continued to fail to appear in federal court without showing cause. Apparently taking its cue from Justice Iredell's dissent in *Chisholm*, Congress soon thereafter drafted the Eleventh Amendment to abrogate the result in *Chisholm*, and President Adams verified its ratification by a requisite twelve States in 1798 (New Jersey and Pennsylvania refused to ratify; Tennessee and South Carolina apparently took no action).⁵¹

The next important case in Eleventh Amendment jurisprudence, and the seminal case supporting the federal-question immunity theory, was decided a century later in 1890. In *Hans v. Louisiana*, a Louisiana citizen brought suit in federal court alleging that Louisiana violated the Contracts Clause⁵² by refusing to pay interest on bonds it had issued.⁵³

The facts in *Hans* were thus similar to those in *Chisholm* with two key differences: First, Hans was a Louisiana citizen suing his home state whereas *Chisholm* involved a citizen of South Carolina suing the State of Georgia. Second, although the subject matter of the claim was similar (the Contracts Clause does not distinguish between public securities and simple contracts), the plaintiff in *Hans* expressly appealed to the constitutional and statutory federal-question jurisdiction of the federal court, whereas *Chisholm*, in the absence of a general federal-question jurisdiction statute at the time,⁵⁴ claimed statutory jurisdiction under section 13 of the Judiciary Act of 1789, which accorded the Supreme Court original jurisdiction over "all controversies of a civil nature, where a state is a party, except between a state and its citizens"⁵⁵ without distinction as between federal question and

⁵⁰ Chief Justice Jay and Justices Blair, Cushing, and Wilson agreed in separate opinions that jurisdiction was proper. See *id.* at 449–53 (Blair, J.); 453–66 (Wilson, J.); 466–69 (Cushing, J.); 469–79 (Jay, C.J.). Justice Iredell was the lone dissenter. See *id.* at 429–49. The opinions of Justice Iredell and Wilson are most pertinent to this Article and are discussed in great detail. See *infra* subpart III.D.

⁵¹ See CHARLES WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 101 & n.2 (rev. ed. 1987) (noting "the informal and careless manner in which ratification was promulgated"); *Eleventh Amendment*, in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 597–604 (Maeva Marcus et al. eds., 1994) [hereinafter 5 DOCUMENTARY HISTORY].

⁵² "No State shall . . . pass any . . . law impairing the obligation of contracts . . ." U.S. CONST. art. I, § 10, cl. 1.

⁵³ *Hans v. Louisiana*, 134 U.S. 1, 1–4, 9 (1890).

⁵⁴ The first general federal-question jurisdiction statute, Act of Feb. 13, 1801, § 11, 2 Stat. 89, 92, was passed by a lame-duck Federalist Congress in 1801, but repealed a year later, Act of Mar. 8, 1802, 2 Stat. 132; see also HART & WECHSLER, *supra* note 1, at 879.

⁵⁵ Act of Sept. 24, 1789, § 13, 1 Stat. 73, 80–81. The corresponding constitutional basis in Article III provides for jurisdiction over "all Cases . . . in which a State shall be a Party." U.S. CONST. art. III, § 2, cl. 2. An argument could be made based on this constitutional provision that there was no need for a statutory basis for the Supreme Court's original jurisdiction in *Chisholm* at all, since, unlike the lower federal courts, Congress has no power not to create a Supreme Court at all or to diminish the constitutional scope of its jurisdiction. See *Ins. Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 701–02 (1982).

Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a

State-private party diversity suits. It was therefore unnecessary to reach in *Chisholm* the question whether the case was one arising under the Constitution. But if *Chisholm* could be seen as an “arising under” case (in the Supreme Court’s original jurisdiction), as the *Hans* Court appears to have assumed a hundred years later and Justice Wilson implied in his opinion,⁵⁶ then the Eleventh Amendment would not have overruled *Chisholm* at all on the diversity theory that it was enacted just to proscribe suits against the States brought by private parties under the diversity jurisdiction in cases that could be pleaded under either diversity or federal-question jurisdiction like *Chisholm* itself.

The *Hans* Court, with the knowledge that the Eleventh Amendment had been passed to overturn the result in *Chisholm*, reasonably would not have thought to look to the diversity theory for its meaning because the Eleventh Amendment would then have no effect at all on claims indistinguishable from *Chisholm*’s claim but arising under the Contracts Clause. This was an important consideration in a time reminiscent of the political and historical context in *Chisholm*, as the southern States confronted daunting war debts in the wake of another rebellion, though of different cause and result.⁵⁷

The *Hans* Court therefore focused on, and ultimately dismissed as untenable, the other distinction—the citizenship of the plaintiff. As the Court admitted, the plain language of the Eleventh Amendment suggested that this was a difference of constitutional moment:

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign state. It is true, the Amendment does so read⁵⁸

statutory grant of jurisdiction. . . . [T]his reflects the constitutional source of federal judicial power: Apart from this Court, that power only exists “in such inferior Courts as the Congress may from time to time ordain and establish.”

Id. (quoting U.S. CONST. art. III, § 1).

⁵⁶ See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 464 (1793) (Wilson, J.).

[W]hen we view this [constitutional] object [to establish justice], in conjunction with the declaration, “that no state shall pass a law impairing the obligation of contracts;” we shall probably think, that this object points, in a particular manner, to the jurisdiction of the court over the several states. What good purpose could this constitutional provision secure, if a state might pass a law impairing the obligation of its own contracts; and be amenable, for such a violation of right, to no controlling judiciary power?

Id. Alexander Hamilton, in March of 1796, similarly believed that Georgia’s revocation of a land-grant contract in a separate case offended the Contracts Clause rendering it amenable to suit in federal court under the federal-question jurisdiction. See *Moultrie v. Georgia*, in 5 DOCUMENTARY HISTORY, *supra* note 51, at 512. See generally BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 1–26 (1938).

⁵⁷ WRIGHT, *supra* note 56, at 94.

⁵⁸ *Hans*, 134 U.S. at 10.

But the Court felt that this, too, was a problematic distinction insofar as it produced the “anomalous result”

that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts.⁵⁹

The *Hans* Court thus took the fateful step of ignoring this distinction and extending the Eleventh Amendment to claims arising under the Constitution of the United States brought by a State’s own citizens.⁶⁰

Also divorced from the language of the Amendment are two exceptions to the States’ sovereign immunity from private suits set forth by the existing doctrine—one was mentioned in *Hans*, the other has been refined in a recent line of Supreme Court decisions. First, the *Hans* Court assumed without explanation that a State could be sued with its consent.⁶¹ But, at least in international law, the consent of one sovereign state to private rights (like the right to sue the state in its courts) against it does not suffice to create such private rights, because consent would affect not only the consenting state’s sovereignty over which it had discretion, but the vitality of the sovereign equality principle in general. And with the erosion of that bedrock, the law of nations, indeed, the society of nations, might collapse into anarchy. To the extent that the sovereign equality of the States might be similarly viewed as important to interstate peace, unilateral consent would seem equally problematic in the Eleventh Amendment context.

Second, under current doctrine, Congress may abrogate the States’ Eleventh Amendment immunity when it explicitly and properly legislates under Section 5 of the Fourteenth Amendment.⁶² This seems inconsistent with the text: the Amendment simply says that the “Judicial power of the United States shall not be construed,” without saying that the courts may not so construe it but Congress by statute (or the States by consent) may. In terms of the sovereign equality principle, it should not matter *who* is defacing a State’s sovereign dignity if it exists as a matter of constitutional law—the State itself or the suprapstate judiciary or legislature, for in any case, the implicit superiority of the State vis-à-vis noncitizens who do not participate in its sovereignty would be undermined. Indeed, it makes better sense to construe the constitutional limitation as intended by the States that ratified the Amendment between 1793 and 1798 to constrain, in addition to the courts, the notoriously partisan Federalist Congress that was in power until

⁵⁹ *Id.*

⁶⁰ *See id.* at 14–17.

⁶¹ *Id.* at 17.

⁶² *See Bd. of Trustees v. Garrett*, 531 U.S. 356, 364 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80 (2000); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996).

1802. For example, under the abrogation theory, Congress could have bypassed the Amendment by passing legislation requiring performance on state securities or contracts that pass in interstate commerce and providing for enforcement by private suits for money damages against States in federal court.

Admittedly, the current doctrine eliminates the possibility of such abrogation by foreclosing Congress's power to abrogate the States' sovereign immunity under Article I⁶³ and limiting that power solely to legislation enforcing the subsequently enacted Fourteenth Amendment (1868), which "fundamentally altered the balance of state and federal power struck by the Constitution."⁶⁴ This supplies a neat *post hoc* reason for why abrogation of state sovereign immunity in federal courts by Congress may not have been an issue at all between 1798 and 1868,⁶⁵ but it introduces a new tension. That is to say, if the State-federal balance was radically reset in 1868, why is it necessary that Congress may only abrogate pursuant to its powers under Section 5 of the Fourteenth Amendment? If a new balance controls, why, as a matter of logic, should not Congress be understood to have greater powers vis-à-vis the States, including the power to render them amenable to suit for money damages to enforce its laws, whenever Congress's power would be "incomplete without the authority to render States liable in damages"?⁶⁶ These are hard questions, but it seems fair to say that the limited doctrine of abrogation, despite its departure from the literal language of the Eleventh Amendment, stands on firmer ground than other aspects of the current law of state sovereign immunity.

C. *The Diversity Explanation*

When compared to the federal-question immunity theory, the diversity theory makes a better attempt to stay faithful to the text of the Eleventh Amendment as superimposed on Article III. It reads the Amendment as addressing only the language of Article III that extends federal jurisdiction "to Controversies . . . between a State and Citizens of another State," and also, presumably (the issue has not been presented in a case), "between a State . . . and foreign . . . Citizens or Subjects."⁶⁷ Specifically, diversity advo-

⁶³ See *Seminole Tribe*, 517 U.S. at 72–73.

⁶⁴ See *id.* at 59 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

⁶⁵ Additionally, the issue of sovereign immunity of States in cases arising under federal law that Congress might even seek to abrogate likely did not come up that often given that another general federal question jurisdictional statute was not enacted until 1875. Act of Mar. 3, 1875, 18 Stat. 470. But federal question suits brought by private parties against States may have been possible in theory under statutes of limited jurisdiction. See, e.g., Act of Feb. 21, 1793, 1 Stat. 318 (authorizing suit in federal district court to revoke an invalid patent); Act of Feb. 15, 1819, 3 Stat. 481 (authorizing suit in district court for patent infringement).

⁶⁶ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19–20 (1989), *overruled by Seminole Tribe*, 517 U.S. at 59–73.

⁶⁷ See *Fletcher*, *The Diversity Explanation*, *supra* note 14, at 1265.

cates contend that the Amendment limits the construction of these provisions to authorize jurisdiction only in controversies in which the State was plaintiff, regardless of the broader implications of the original phrasing. The important corollary is that the Amendment does not apply at all to the other jurisdictional headings, most notably, the "arising under" clause, and so the Amendment says nothing about whether private citizens may or may not bring federal question suits against the States.

Differently stated, the crucial difference as to textual interpretation between the diversity theory and the international law theory concerns the proper way to understand the words "any suit in law or equity." The diversity theory reads the phrase narrowly to mean "any suit" brought under the two diversity jurisdictional heads ("State-Citizen" and "State-Foreign"), whereas the international law theory reads it more broadly to mean "any suit in law or equity" brought by a citizen of another State or foreign citizens or subjects against one of the States in any applicable heading of Article III.⁶⁸ That difference, though, would add only one more (albeit important) Article III jurisdictional peg—"all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." This is because by Article III's literal language, the Eleventh Amendment would not apply to cases affecting ambassadors (who represent, and are therefore not "Citizens or Subjects of, any foreign States") or of admiralty (not "law or equity"); or to "controversies" involving the United States as party, between the States, citizens of different States, or citizens of the same State.

There is one more point. The original State-Foreign diversity heading of Article III extended judicial power to "controversies . . . between a State . . . and foreign States, Citizens or Subjects." The Eleventh Amendment only addressed suits against States brought by "Citizens of another State, or by Citizens or Subjects of any Foreign State." The reasonable conclusion—consistent with the sovereign equality principle—would be that suits against States brought by "foreign States" were still to be permitted; indeed, to allow them would be to accord a greater dignity to the State by virtue of the implied equality of station to a nation-state in the community of nations. The Supreme Court decision in *Principality of Monaco v. Mississippi*,⁶⁹

⁶⁸ Article III, Section 2, clause 1 reads as follows:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

⁶⁹ 292 U.S. 313 (1934).

however, extended the Eleventh Amendment bar to such suits.⁷⁰ It is not clear whether diversity theorists take issue with this extension, but if they do not, it would be another jurisdictional peg that the international law theory creates vis-à-vis the diversity theory.

There are two important discrepancies that make it difficult to square the diversity theory with the text and history of the Eleventh Amendment. With regard to language, it seems that if the Amendment were meant to be restricted to the two diversity headings in Article III, it would say that the judicial power should not be construed to extend to “controversies” (the only word commonly used to mark the subject matter of those two diversity headings) rather than to “any suit in law or equity.” Under the international law theory, the careful choice of the words “any suit in law or equity” is sensibly explained as an integrated reference to the Article III words “Cases, in Law and Equity,” describing federal jurisdiction arising under federal law *and* under the two sorts of diversity “Controversies.”⁷¹

With respect to history, there is a bigger problem—claims held by foreign citizens and subjects and out-of-state U.S. citizens were viewed as raising at least potential federal questions around the time that *Chisholm* was decided and the Eleventh Amendment was enacted.⁷² Certainly, claims by British creditors under the Paris Treaty of 1783 arose under federal law, and Justice Wilson, for one, perceived the contract claim in *Chisholm* as implicating the Contracts Clause. The drafters of the Eleventh Amendment were certainly aware that the federal judicial power *might* be construed to extend to contract claims against the States on the independent ground that they arose under “the Constitution, the Laws of the United States, and Treaties.” It seems implausible, then, as we have said, that they would draft the Amendment to restrict only diversity claims, since the effect of such a constitutional amendment could be easily overcome by the passage of a general federal-question jurisdiction statute, such as was in fact enacted by the lame-duck Federalist Congress in 1801, a mere three years after the Amendment’s ratification.

That being said, the international law theorists would agree with the diversity theorists that *Hans v. Louisiana* was wrongly decided, but not insofar as it interpreted the Eleventh Amendment to reach federal-question jurisdiction. Rather, the international law theory proposes that the Amendment, as its literal language suggests, does bar “any suit in law or equity,” including federal-question suits, when the plaintiff is a citizen of another State or citizen or subject of a foreign state. The Amendment does not say anything about the case of a federal-question suit against a State brought by a citizen of the State—a scenario that was not presented by the facts in

⁷⁰ *Id.* at 331–32.

⁷¹ *Cf.* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821) (deciding that writ of error from state-court decision was not a “suit”).

⁷² See *supra* note 56 and accompanying text.

Chisholm.

But, if *Chisholm* were a citizen of Georgia, what would the drafters of the Eleventh Amendment have said, presuming that they were thinking of the problem by analogy to contemporary international law and sovereign nation-states? On one level, the answer seems easy, because even if the Framers were receptive to the Enlightenment international law norm that sovereign states should be subject to the legal claims of their citizens, that norm contemplated suability for important, fundamental violations of law. It is doubtful whether a common-law *assumpsit* cause of action for the breach of a contract entered into by a State at war as in *Chisholm* would have been considered a fundamental violation even if, as Justice Wilson assumed at the time and the *Hans* Court assumed a hundred years later, such a violation did state a constitutional claim under the Contracts Clause as then understood. This would require, however, a new distinction between fundamental violations for which States are suable and federal statutory and constitutional claims of a nonfundamental nature from which the States would be immune. While distinguishing between actionable fundamental constitutional violations and less fundamental ones for which immunity applies may seem sensible in theory, it would seem difficult to do in practice, nor does American constitutional law present any basis for such a distinction.

Presuming, then, that fundamental violations are congruent with constitutional ones, and assuming as well, in line with the modern position, that such violations by a nation-state against its citizens state a claim arising under the law of nations (as we must by way of analogy since the *Hans* Court assumed that *Hans* presented a claim arising under the laws of the United States), the only obstacle from the international law perspective to an exercise of jurisdiction on these facts would be the affront it would occasion to the internal sovereignty of the nation-state. As applied to the American case in 1798, this would have been a very difficult question—the States had ceded a measure of their sovereignty to the federal government and had promised that the laws of the United States would be the supreme law of the land,⁷³ but this was premised on a theory of mutually exclusive spheres of sovereignty that did not cleanly address the paradoxical possibility that valid laws of the United States might displace a State's power vis-à-vis its citizens. We do have, however, the Republican Government Guarantee Clause⁷⁴ (or, as Professor Massey advocates, the Tenth Amendment),⁷⁵ which might be read to exercise such a braking force.⁷⁶ The best that we

⁷³ U.S. CONST. art. VI, cl. 2.

⁷⁴ U.S. CONST. art. IV, § 4.

⁷⁵ Massey, *supra* note 8, at 143–45.

⁷⁶ *Cf. Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 448 (1793) (Iredell, J., dissenting) (“The people of the State created, the people of the State can only change, its Constitution. Upon this power there is no other limitation but that imposed by the Constitution of the United States; *that it must be of the Republican form.*” (emphasis added)).

can say, then, is that there is no clear answer to this question.

But in 1890, for the same reason of federal-state rebalancing articulated in *Fitzpatrick v. Bitzer* grounding the logic of congressional abrogation under the Fourteenth Amendment,⁷⁷ it seems more reasonable to conclude that internal sovereignty ought not bar suits against a State by its citizens alleging violations of, at least, the Constitution of the United States. And, as Part IV will explain, the Privileges or Immunities Clause of the Fourteenth Amendment may be read to say that all United States citizens should enjoy this right to sue for constitutional violations to the same extent enjoyed by citizens of the State.⁷⁸

II. INTERNATIONAL LAW, INTERSTATE POLITICS

So far, this Article has introduced a theory of the Eleventh Amendment's meaning; one that fits the Amendment's language better than existing theories, but a theory, nonetheless, the validity of which depends on the existence *vel non* of supporting evidence. Part III will discuss the pertinent evidence and compare the fit of this theory with that of the other theories; it seems useful, first, to explain in general terms why the theory is a plausible one. By this I mean why it makes sense to argue that the founding generation (most importantly, those associated with the Eleventh Amendment) perceived the States as sovereign nation-states in some respects and accordingly drafted constitutional text to incorporate certain useful international law rules.

The argument here is not that the founding generation thought of the law of nations as an independent substantive body of law (like the Constitution, laws passed by Congress, and the laws of the several States) that supplies binding rules of decision in the domestic context. There is a rich, separate literature concerning the degree to which the Founders felt themselves obligated by international law⁷⁹ and whether these obligations were thought to have operated through federal or state law.⁸⁰ This Article fo-

⁷⁷ 427 U.S. 445, 452–53 (1976).

⁷⁸ U.S. CONST. amend. xiv, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

⁷⁹ See, e.g., Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1952); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1084–95 (1985).

⁸⁰ Compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 821 (1997) (contending that the idea that customary international law is federal common law is of recent vintage and inconsistent with separation of powers, federalism, and American democracy), with Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1827 (1998) (supporting the traditional position

cuses, rather, on the unexplored nexus between the principles and concepts of the law of nations and domestic constitutional law doctrines dealing with interstate puzzles analytically similar to those encountered in international politics. This influence is harder to trace, but it may be more significant insofar as it illuminates solutions to these constitutional puzzles—solutions that are part of the mainstream of constitutional jurisprudence in a way that public international law generally is not. The particular puzzle that is our concern is the sovereignty of the States in the federal system.

A. *Theories of Sovereignty at the Founding*

Sovereignty, as conceptualized by the founding generation, had two relevant components. External sovereignty, in Justice Iredell's words, was a state's power to "regulat[e] [its] intercourse with foreign nations."⁸¹ Internal sovereignty referred to a state's "exclusive right of providing for [its] own government" within its territories.⁸² Typically, both sorts of sovereignty would reside in one government; the American political experiment was to create a system in which the two sovereignties were each matched to different governments.

An important aspect of sovereignty as it was then understood was exclusivity—the sovereign power could not be shared, at least beyond the foundational division between the internal and the external. That is to say, it was not conceivable that internal sovereignty could be jointly wielded by two governments in one domain; rather, each had to be sovereign in its own separate sphere.⁸³ Moreover, sovereignty within that sphere could similarly not be diffused: the notion that a state was not a sovereign state unless supreme and indivisible power was vested in *one* body was so resiliently canonical that early American attempts in the 1760s to carve out spheres of exemption *within* Parliament's legislative sovereignty quickly gave way to the use of sovereignty as an offensive weapon from *without*—Parliament had no authority over the American colonies because the colonial legislatures themselves were sovereign.⁸⁴

Thus, the concept of sovereignty supplied a crucial political theory of revolution that had to be reconciled with the sovereignty of the States as parts of the United States once the revolution was won. Because state legislatures—not Congress—were the original repositories of legislative sovereignty transferred from Parliament by revolution, the dogma of exclusive sovereignty (in thirteen iterations) stood as an impediment to the creation of

that international law is federal law and countering that Bradley and Goldsmith's proposal is "a muddled notion that offers only an invitation to chaos").

⁸¹ *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 93 (1795) (Iredell, J., dissenting).

⁸² *Id.*

⁸³ THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961).

⁸⁴ See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 344–54 (1969).

a “more perfect Union.”⁸⁵ The theoretical conundrum confronting the founding generation, then, was to effect a voluntary transfer from the States of that quantum of sovereignty necessary to make a “general government” sufficiently powerful to conduct itself as a unitary state actor in its relations with other nation-states,⁸⁶ while ensuring “domestic Tranquility” among member states who retained sovereignty within their borders.

The distinction between internal and external sovereignty was a powerful means of rationalizing this statebuilding project. The States would retain their respective internal sovereignties, and the federal government would acquire the States’ collective external sovereignty. The solution, neat in theory, presented difficult problems in practice, especially with respect to the regulation of hybrid interactions among the States and between individual States and foreign states, as opposed to interactions between all the States as one unit and foreign states (pure questions of external sovereignty), or wholly within one State (pure internal sovereignty issues). Clearly, the issues of interstate regulation had both external and internal sovereignty implications—harmonious relations among the States were crucial to national power in external relations, but at the same time, heavy-handed direction from the general government had to be curtailed for fear of offending the internal sovereignty of the States, which had voluntarily agreed to the union.

B. Federal Powers Under the Constitution and the Sovereignty Distinction

The general government’s powers in this interstitial region can be characterized in two ways that correspond roughly to the external and internal sovereignty distinction. On one hand, the Constitution invested the three branches of general government with national powers intended to create a strong, wealthy, and unified polity where the States were conceived of as constituent parts of one nation. These powers were of the “command and control” type—the relevant branch was to regulate with the authority of a superior over subordinates, and the States were in this sense administrative subunits.⁸⁷ On the other hand, there were powers designed to increase cooperation and to decrease conflict among the States without denigrating their individual internal sovereignties—precisely the purpose of public international law. As such, these powers—designed to persuade rather than to coerce—were of the type that might be exercised by an international governmental institution.

1. Article IV: The “International” Constitution.—Article IV directly concerns the regulation of relations among the States—it is in this sense the best example of the Constitution as an international governance project.

⁸⁵ U.S. CONST. pmbl.

⁸⁶ See THE FEDERALIST NO. 22, at 144 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁸⁷ See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 469–79 (1793) (Jay, C.J.).

Specifically, the Full Faith and Credit Clause⁸⁸ formalizes the rule of international comity; the Privileges and Immunities Clause⁸⁹ and second and third clauses of Section 2 can be understood as a universal agreement on reciprocal treatment and extradition;⁹⁰ and Section 3 affords constitutional recognition of the States' territorial sovereignty.⁹¹ Section 4, the Republican Government Guarantee Clause, merits closer attention.

The Section's promise that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government"⁹² makes no sense as a guarantee of a republican form of *national* government, as Articles I, II, and III have already specified in detailed form how that government was to be structured, and any transgression of that structure would suffice as an unconstitutional act in its own right. The promise "to every State," must mean, rather, a guarantee to the States, or more aptly, to the citizens constituting "every State," that the federal government would always act in a manner conducive to a republican form of *state* government—one that was representative and responsive to the rights and wishes of its citizens.⁹³ This is precisely how Justice Iredell read the Republican Government Guarantee Clause in his famous *Chisholm* dissent: "The people of the State created, the people of the State can only change, its Constitution. Upon this power there is no other limitation but that imposed by the Constitution of the United States; *that it must be of the Republican form.*"⁹⁴ And indeed, the Founders appear to have intended the same meaning, as evi-

⁸⁸ "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

⁸⁹ "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

⁹⁰ U.S. CONST. art. IV, § 2, cl. 2.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Id.

No person held to Service or Labour in one State, under the laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. CONST. art. IV, § 2, cl. 3.

⁹¹ U.S. CONST. art. IV, § 3, cl. 1.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected with the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

Id.

⁹² U.S. CONST. art. IV, § 4.

⁹³ See LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 908–12 (3d ed. 2000). The commentary on the Republican Government Guarantee Clause has generally neglected the Kantian interstate or international implications of the Clause's structural requirement.

⁹⁴ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 448 (1793) (Iredell, J., dissenting) (emphasis added).

denced by James Madison's proposed clarification of the original resolution, which, though ultimately rejected, was faithful to the intent of the provision: "The republican constitutions and the existing laws of each state, to be guaranteed by the United States."⁹⁵ The Founders in 1787, desirous of "peace and concord" among the States,⁹⁶ had codified in the clause Kant's famous "first definitive article of perpetual peace,"⁹⁷ eight years before he had called it such in print.

While Article IV may be the most "international" article of the Constitution, we can see a mixing and balancing of national and international functions in the constitutional design of each branch of the federal government. Article II, for example, sets forth an electoral system for the selection of the President (giving special weight to the sovereignty of the several States)⁹⁸ that is more commonly seen in the selection mechanisms for leaders of international institutions than of unitary democratic states. But in terms of mission, the designated responsibilities of the President, charged with the execution of the Constitution and of the laws of the United States, are overwhelmingly national in the sense that the performance of his duties are predicated on a vision of the States as parts of one whole. The one notable exception (much more important then than now) is the Militia Clause,⁹⁹ which envisions the President in the role of a supreme multilateral force commander in command of the separate levies of the States in the event of a threat to their collective security.

2. *Article I: National Legislative Sovereignty and State Sovereignty.*—Historically and normatively inclined to the British example, the Founders placed primary sovereignty in the legislative branch; consequently, the job of balancing internal and external sovereignty in Article I assumed primary importance in constitutional design. But it was a relatively straightforward assignment in terms of institutional design once the innovation of a bicameral body with proportional representation in one part and fixed apportionment in the other was introduced to deal with the biggest problem of interstate population and resource inequalities.¹⁰⁰ Moreover, the venerated model of legislative sovereignty in Great Britain had generated plentiful commentary and guidance from admirers and critics

⁹⁵ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 206 (Max Farrand ed., 1911) [hereinafter 1 FARRAND].

⁹⁶ *Chisholm*, 2 U.S. at 423 (argument of Attorney-General Randolph) ("Are not peace and concord among the states, two of the great ends of the constitution?").

⁹⁷ See KANT, PERPETUAL PEACE, *supra* note 33, at 112.

⁹⁸ U.S. CONST. art. II, § 1, cls. 2–3.

⁹⁹ "The President shall be Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States . . ." U.S. CONST. art. II, § 2, cl. 1.

¹⁰⁰ See 1 FARRAND, *supra* note 95, at 130–239 (debates of June 6–13, 1787, with respect to the design and terms of the Houses of Congress).

alike.¹⁰¹ As a practical matter, then, because setting up a federal legislative branch was not all that different from establishing a variant of Parliament, once the interstate inequality problem was resolved, the British example sufficed to answer many of the design issues (for example, bicameralism) the Framers faced.¹⁰²

The more complex, international aspects of balancing legislative sovereignty in Article I, for which there was less guidance from domestic practice, the British model, or political theory, involved constitutionalizing safeguards that maintained peace among the States while preserving elements of their status quo internal sovereignty. Specifically, Article I, Section 10's list of prohibitions on the States is unmistakably cued to classical international relations theories with respect to the causes of conflict in interstate politics—offensive military capabilities, standing armies, aggressive trade and finance practices (most notably discriminatory taxes on imports and exports), and alliances and preemptive mutual defense treaties.¹⁰³ The detailed limitations on trade and finance powers in Section 10, and Section 8's grant to Congress of the sweeping power to "regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes" indicate the extent to which the Founders justly feared the economic causes of international strife in the late eighteenth-century era of high mercantilism.¹⁰⁴ Indeed, Article I, Section 10's prohibitions on the States' treaty-making and warmaking powers were the successors to identical provisions in Article 9 of the Articles of Confederation, which were adopted precisely because of the threat of wars *among* the colonies over the profitable fur trade with the Indians.¹⁰⁵ As early as the Continental Congress of 1776,

¹⁰¹ See, e.g., CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 156–66, 325–33 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone trans. & eds., Cambridge Univ. Press 1997) (1748); VATTTEL, *supra* note 25, at 63 (65 in 1805 ed.) (Bk. I, Ch. II, § 24).

¹⁰² See generally 1 FARRAND, *supra* note 95, at 224–239. This did not meet the approval of all delegates at the Constitutional Convention. Pierce Butler of South Carolina was particularly hostile to the British example, complaining that "[w]e are constantly running away with the idea of the excellence of the British parliament, and with or without reason copying them; when in fact there is no similitude in our situations." *Id.* at 238.

¹⁰³ Section 10 states in part: "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal . . ." U.S. CONST. art. I, § 10, cl. 1. The subsequent clause provides:

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States

U.S. CONST. art. I, § 10, cl. 2. Section 10 also forbids any state to "lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." U.S. CONST. art. I, § 10, cl. 3.

¹⁰⁴ See THE FEDERALIST NO. 42, at 267–69 (James Madison) (Clinton Rossiter ed., 1961); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 334–35 (Max Farrand ed., 1911) (comments of Governor Randolph, George Mason, and James Madison at the Virginia Convention, June 21, 1788).

¹⁰⁵ See VINE DELORIA, JR. & RAYMOND J. DEMALLIE, 1 DOCUMENTS OF AMERICAN INDIAN

James Wilson had warned that “[n]one should trade with Indians without a license from Congress. A perpetual war would be unavoidable, if everybody was allowed to trade with them.”¹⁰⁶

The skeptic may reasonably respond that Section 10 should be viewed as a national project provision inasmuch as its primary intent was to limit the States’ usurpation of foreign policy powers assigned to the new federal government vis-à-vis foreign countries. In this formulation, Section 10 constitutes merely the negation of the States’ powers logically compelled by the affirmative grant of similar powers to Congress in Section 8: what Congress may do, the States may not do. This view presumes that the limitations on the States’ rights to make war, to make treaties, and to engage in confrontational trade policies speak predominantly, if not exclusively, to such capacities in the international rather than the interstate context.

This interpretation ignores the historical realities of the time and the constitutional text. However inconceivable now, it is likely that the Framers perceived the threat of war between Massachusetts and New York, or between eastern Massachusetts and western Massachusetts,¹⁰⁷ to be as great as the threat of another war against England or against Spain. Interstate trade wars, for one, were legion. After the War for Independence, “[t]he States passed tariff laws against one another as well as against foreign nations; and, indeed, as far as commerce was concerned, each State treated the others as foreign nations. There were retaliations, discriminations, and every manner of trade restrictions and impediments which local ingenuity and selfishness could devise.”¹⁰⁸ Disputes between the States over border lands and overlapping land grants generated as much, if not more, hostility—including periodic border skirmishes between settlers from different States. And conflicting claims to lucrative prize ships and spoils of war seized on the high seas were yet another source of high tension among the States.¹⁰⁹

In the parlance of modern neorealist international relations theory,¹¹⁰

DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775–1799, at 13–15 (1999). Under the Articles system, the States had more sweeping treaty-making powers vis-à-vis the Indian tribes, most notably the right to negotiate purchases of Indian land directly. *See id.* at 15. The States were stripped of this authority with the passage of the Trade and Intercourse Act, 1 Stat. 137 (1790).

¹⁰⁶ 6 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 1079 (Worthington Chauncey Ford ed., 1906).

¹⁰⁷ *See* WOOD, *supra* note 84, at 284–86 (concerning the history of the state constitutional crisis in Massachusetts of the late 1770’s and Shay’s Rebellion in 1786).

¹⁰⁸ ALBERT J. BEVERIDGE, I THE LIFE OF JOHN MARSHALL 310 (1916); *see also* CARL BRENT SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 25–27 (2d ed. 1954).

¹⁰⁹ *See, e.g.,* Penhallow v. Doane’s Admr’s, 3 U.S. (3 Dall.) 54, 60–63 (1795) (involving dispute between New Hampshire and Massachusetts citizens over a prize ship seized during the War for Independence).

¹¹⁰ *See* John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT’L SECURITY, Winter 1994–95, at 7 (extolling neorealism’s superior explanatory leverage vis-à-vis contending theories of international relations).

despite the common cultural, socioeconomic, and historical ties shared by the thirteen newly minted sovereign States, that a security dilemma would persist amongst them was inevitable.¹¹¹ And whatever unifying value the ex-colonies' common ties might have had was further discounted by the trauma of having waged a bloody war of independence against their progenitor, with whom they also shared these deep ties. From this perspective, the Constitution and the federal institutions it created served, in addition to the typical supervisory functions of national governments, functions of assurance, monitoring, and information-sharing among the States needed to preserve interstate peace and to allow the newly federated republic sufficient breathing space to incubate.

The constitutional text also supports the contention that parts of Article I depicted the States as analytically indistinguishable from independent sovereign countries in their mutual relations and devised international constitutional solutions accordingly. The formulation of Congress's Commerce power in Article I, Section 8 is illustrative.¹¹² The power to regulate commerce "among the several States" is listed between such power to regulate commerce "with foreign Nations" and "with the Indian Tribes," suggesting equivalency.

Likewise, in Article I, Section 10, the proscription on a State setting "any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws" (without Congress's consent) is open-ended,¹¹³ but we know from historical context that such tariffs were as commonly exercised against other States as other countries.¹¹⁴ The Import-Export Clause was thus surely intended for interstate and international trade alike without distinction.¹¹⁵ The prohibition on States entering "any Treaty, Alliance, or Confederation,"¹¹⁶ similarly proscribes in one breath treaties, alliances, confederations, and wars among the States and between a State and foreign countries. Finally, the omnibus re-

¹¹¹ See generally ROBERT JERVIS, *PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS* 3-57 (1976) (articulating the logic behind the security dilemma that state actors face in their interactions with each other given uncertainty about the other's intentions).

¹¹² "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8.

¹¹³ U.S. CONST. art. I, § 10, cl. 2; see also art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State."); art. I, § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay Duties in another.").

¹¹⁴ THE FEDERALIST NO. 42, at 267 (James Madison) (Clinton Rossiter ed., 1961) ("A very material object of [commerce] power [under the Articles of Confederation] was the relief of the States which import and export through other States from the improper contributions levied on them by the latter.").

¹¹⁵ See *id.* For this reason, Justice Thomas has recently urged the Court to decide the constitutionality of discriminatory state taxation schemes under the Import-Export Clause rather than under its traditional dormant commerce clause rationale. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).

¹¹⁶ U.S. CONST. art. I, § 10, cl. 1.

striction on States entering into “any Agreement or Compact with another State, or with a foreign Power,” or keeping troops, warships, or waging offensive war without Congress’s consent,¹¹⁷ similarly treats the States as analytically indistinguishable from foreign countries. This clause, in particular, seems more like an international mutual security pact than a provision in a domestic constitution.

3. *The National and Interstate Functions of Article III Courts.*—Given the role of courts as institutions intended for the peaceful mediation of disputes, it is not surprising that Article III, like Article I with respect to Congress, invested the federal judiciary with a robust set of international as well as national functions. When fulfilling a national function, the federal courts were to decide cases authoritatively, confident of the binding nature of their decisions as final arbiters in a hierarchical system, even with States as parties. The appellate jurisdiction of the Supreme Court¹¹⁸ was the paradigmatic national function, even as to the review of state court judgments, insofar as the Court was intended in its appellate capacity to act as the national court of last resort with respect to a decision that had already been decided by a lower state or federal court.

By contrast, in the exercise of “international” jurisdiction over a controversy, especially one to which a State was party, the Constitution contemplated that the courts tread carefully—looking to explicit congressional guidance, deciding only the issue in controversy, and refraining from setting sweeping precedents. In such suits, the federal courts might be understood to have been invested with more conciliatory powers, with the authority not to make decisions for affirmative national ends, but rather to arbitrate disputes to preserve interstate peace. Justice Iredell brilliantly captured the sensitive international function of the judiciary, and how it differed from the legislative and executive branches in this respect:

The powers of the general government, either of a legislative or executive nature, . . . require no aid from any state authority. . . . The judicial power is of a peculiar kind. It is indeed commensurate with the ordinary legislative and executive powers of the general government, . . . [b]ut it . . . goes further. Where certain parties are concerned, *although the subject in controversy does not relate to any of the special objects of authority of the general government, wherein the separate sovereignties of the states are blended in one common mass of supremacy*, yet the general government has a judicial authority . . . and

¹¹⁷ U.S. CONST. art. I, § 10, cl. 3.

No State shall, without the Consent of the Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Id.

¹¹⁸ U.S. CONST. art. III, § 2 (“In all the other cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

the legislature of the United States may pass all laws necessary to give such judicial authority proper effect. So far as states, under the constitution, can be made legally liable to this authority, so far, to be sure, they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited. But it is limited no further than the necessary execution of such authority requires. The authority extends only to the decision of controversies in which a state is a party, and providing laws necessary for that purpose.¹¹⁹

Guidance from Congress was particularly important when appointed judges of the general government were exercising politically sensitive international functions because the States were at least represented in that body. Indeed, the absence of a congressional statute clearly authorizing jurisdiction in private contract claims against States (rather than the State-party provision of section 13 of the first Judiciary Act) seems to have been an important reason for Justice Iredell's dissent in *Chisholm*.¹²⁰

Dividing Article III, Section 2's nine enumerated categories of federal jurisdiction thematically between national and international disputes is illuminating. The national category would contain the first four jurisdictional heads: (1) "all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority"; (2) "all Cases affecting Ambassadors, other Public ministers, and Consuls"; (3) "all Cases of admiralty and maritime Jurisdiction"; and (4) "Controversies to which the United States shall be a Party."¹²¹ The international subset would include the next five headings, all referred to in Article III as "controversies": (1) "between two or more States"; (2) "between a State and Citizens of another State"; (3) "between Citizens of different States"; (4) "between Citizens of the same State claiming Lands under the Grants of different States"; and (5) "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."¹²² "Controversies" in which the United States is a party could also fall in this category, insofar as they might involve the courts in international governance functions in the sense of a supra-State governmental body challenging a State's misconduct (like the United Nations with respect to the United States' failure to pay dues).

The international law theory thus presents a new explanation for the use of "cases" as opposed to "controversies" with respect to Article III's jurisdiction headings—a topic that has attracted much attention.¹²³ Specifi-

¹¹⁹ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435–36 (1793) (Iredell, J., dissenting).

¹²⁰ See *id.* at 436–37 ("It follows, therefore, unquestionably, I think, that looking at the act of Congress, which I consider is on this occasion the limit of our authority (whatever further might be constitutionally, enacted), we can exercise no authority in the present instance . . .").

¹²¹ U.S. CONST. art. III, § 2, cl. 1.

¹²² *Id.*

¹²³ Compare Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 240 (1985) (arguing that Article III establishes "two tiers" of federal jurisdiction: mandatory for "all cases" and subject to Congress's discretion for "controversies"),

cally, “cases” could be understood to refer to jurisdictional headings in which the federal courts were to adjudicate in a more binding law-like manner as authoritative national tribunals, paradigmatically in federal criminal matters. On the other hand, “controversies” delineated politically-sensitive international jurisdictional headings where the federal courts were to function more cautiously and with the support of Congress, tending more to mediation than adjudication, and to exclusively civil matters as opposed to “cases” that could be either civil or criminal.¹²⁴ Tellingly, Justice Iredell defined the law of nations as the law governing “*controversies* between nation and nation.”¹²⁵

The analytical sharpness of the bifurcation glosses over the important possibility that a particular suit against a State might implicate both national and international functions such as, for example, a diversity suit brought by a citizen or a subject of a foreign state or a citizen of another state that also arises under federal law, in which case a choice would be forced between the court acting authoritatively at the expense of state sovereignty or vice versa. The Eleventh Amendment, if read plainly, appeared to address at once the interpretation of one “Cases” heading in the “national” category—the “arising under” jurisdiction—and two “international” headings of federal jurisdiction: “Controversies . . . between a State and Citizens of another State” and “between a State . . . and foreign States, Citizens, or Subjects.” By its unqualified prescription, lifted from the canons of international law, it seems to be saying in no uncertain terms that in these “cases” and “controversies” (collectively, “suits”), the federal courts must respect the States’ sovereignty by refusing to acknowledge that noncitizens without claims to that sovereignty have private causes of action against them.

It is worth noting that of these nine classes of cases and controversies, the only instances in which Article III expressly accorded the Supreme Court original jurisdiction were cases affecting ambassadors and public ministers and where States were parties¹²⁶—the singling-out of these two

Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990) (contending that the Judiciary Act of 1789 is consistent with the two-tiered explanation), and Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651 (1990) (defending the two-tiered theory against critics), with Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990) (contesting the fit of Amar’s hypothesis with historical evidence and the Judiciary Act of 1789, and debating the wisdom of its implication that “all cases” including, for example, admiralty cases, are more important by virtue of mandatory jurisdiction, than “controversies” involving the United States or states as parties).

¹²⁴ Cf. Meltzer, *supra* note 123, at 1574–76.

¹²⁵ See James Iredell, Charge to the Grand Jury of the Circuit Court for the District of South Carolina (May 12, 1794), reprinted in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 454, 459 (Maeva Marcus et al. eds, 1988) (emphasis added) [hereinafter 2 DOCUMENTARY HISTORY].

¹²⁶ “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction.” U.S. CONST. art. III, § 2, cl. 2.

categories makes perfect sense from an international law perspective, *if one were to equate the sovereign dignity of the States with that of nation-states*. In these two sets of cases, the federal judiciary was called upon to exercise international functions of acute political sensitivity, the former in a purely external sense, the latter in an internal sense. This sensitivity justified specific assignment to the highest court of the general government as a sign of respect for the sovereign dignity of the foreign states (of whom the law of nations considered ambassadors and public ministers full representatives)¹²⁷ and the States that would be parties before the Court.¹²⁸ Justice Iredell reasoned similarly in his Circuit Court opinion in *Chisholm v. Georgia*, concluding that the latter half of this original jurisdiction was *exclusive* to the Supreme Court: "It may also fairly be presumed that the several States thought it important to stipulate that so awful and important a Trial [to which a State is party] should not be cognizable by any Court but the Supreme."¹²⁹ The conclusion was not challenged when the Supreme Court heard *Chisholm* under its original jurisdiction.¹³⁰

Although it has long been accepted that lower federal courts and state courts may have concurrent jurisdiction over all such cases¹³¹ with the exception of "controversies between two or more States,"¹³² it is a telling insight into Justice Iredell's understanding of sovereign dignity that he continued to maintain that the Supreme Court alone possessed original jurisdiction for *all* cases involving foreign emissaries and States as parties. In

¹²⁷ See THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation.

Id.; see also VATTEL, *supra* note 25, at 523.

¹²⁸ See *California v. Arizona*, 440 U.S. 59, 65-66 (1979) ("The constitutional grant to this Court of original jurisdiction is limited to cases involving the States and the envoys of foreign nations. The Framers seem to have been concerned with matching the dignity of the parties to the status of the court.").

¹²⁹ *Farquhar v. Georgia* (C.C.D. Ga. 1791) (Iredell, J.), reprinted in 5 DOCUMENTARY HISTORY, *supra* note 51, at 154.

¹³⁰ See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 419 (1793). None of the Justices disputed the circuit court's conclusion.

¹³¹ See *Ames v. Kansas ex rel Johnson*, 111 U.S. 449 (1884) (recognizing the constitutionality of concurrent jurisdiction in state courts in such cases); *Bors v. Preston*, 111 U.S. 252 (1884) (acknowledging the constitutionality of concurrent jurisdiction in the lower federal courts in cases "affecting Ambassadors, other public Ministers and Consuls"); see also 28 U.S.C. § 1251(b) (1994).

The Supreme Court shall have original but not exclusive jurisdiction of: (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; (2) All controversies between the United States and a State; (3) All actions or proceedings by a State against the citizens of another State or against aliens.

Id.; HART & WECHSLER, *supra* note 1, at 294-98.

¹³² 28 U.S.C. § 1251(a) (1994) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.").

a circuit court case heard two months after *Chisholm* involving a Genoese consul charged with a misdemeanor, the circuit panel upheld its jurisdiction by a vote of two to one. Justice Iredell was the emphatic dissenter:

I do not concur in this opinion, because it appears to me, that for obvious reasons of public policy, the Constitution intended to vest an exclusive jurisdiction in the Supreme Court, upon all questions relating to the Public Agents of Foreign Nations. Besides, the context of the judiciary article of the Constitution seems fairly to justify the interpretation, that the word original, means exclusive, jurisdiction.¹³³

Though his position was never law (though it was shared, among others, by Alexander Hamilton in *Federalist No. 81*),¹³⁴ it demonstrates a logical consistency that should inform analysis of Iredell's conception of what sovereign dignity required of the federal judiciary in *Chisholm*.

C. The Problem of Many Sovereigns: Vattel and the Law of Nations

The preceding discussion explained why it makes sense to read the Constitution as treating the States like sovereign nation-states in certain respects, and to view the federal government's role, accordingly, as similar to that of an international governance institution, relying more on cooperation than coercion in these matters. Of course, for the international law theory to be a plausible explanation of the Eleventh Amendment, it is necessary to show, in addition to issue congruence between American domestic federalism and international politics, that the founding generation was knowledgeable about international law, and that the Founders consciously applied this knowledge to these problems. This burden of proof is not a particularly difficult one because there is abundant evidence that the founding generation, including, most importantly, Justice Iredell, was thoroughly well-versed in the state-of-the-art literature on international law and politics. And there was a *primus inter pares* among these works, the previously cited international law treatise by the Swiss writer Emmerich de Vattel; it was the most popular and widely available tract of its kind in late eighteenth-century America—cited twice in the *Chisholm* opinions.

Vattel's *The Law of Nations; or Principles on of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*,¹³⁵ first published in French in 1758, is now a forgotten book, but it was once one of the most influential legal treatises in American constitutional law.¹³⁶ A search of Westlaw's electronic database revealed references to Vattel's book in

¹³³ *United States v. Ravarra*, 2 U.S. (2 Dall.) 297 (C.C.D. Pa. 1793). Strangely, the relevant volume (two) of *Documentary History of the Supreme Court* makes no reference to this case, nor does it appear that Justice Iredell issued grand jury charges specific to the case.

¹³⁴ See *supra* note 127.

¹³⁵ See *supra* note 25.

¹³⁶ See generally LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* xxv-xxvi (3d ed. 1993).

161 Supreme Court cases before 1945,¹³⁷ more references than to any of the multiple works individually or combined of Vattel's international law peers who are more commonly known today like Hugo Grotius (73 references) or Samuel Pufendorf (25),¹³⁸ or eighteenth-century political theorists like the Baron de Montesquieu (16), to whom the Founders turned for guidance on federalism issues.

American leaders, it is known, possessed at least three copies of Vattel's book as early as 1775. Benjamin Franklin, in a letter to a Swiss sympathizer of the American cause who had sent the copies, noted the book's importance to the Founders:

I am much obliged by the kind present you have made us of your edition of Vattel. It came to us in good season, when the circumstances of a rising State make it necessary frequently to consult the law of nations. Accordingly, that copy which I kept (after depositing one in our own public library here, and sending the other to the College of Massachusetts Bay, as you directed) has been continually in the hands of the members of our Congress now sitting.¹³⁹

These copies were probably in French¹⁴⁰ (which many of the Founders in-

¹³⁷ The electronic search was conducted in the Westlaw SCT-OLD directory of Supreme Court cases prior to 1945 using "Vattel," "Vat. & sovereign!," and "Vatt." term searches. The search yielded 145 hits for "Vattel," 11 hits for "Vat. & sovereign!," and 31 hits for "Vatt." Duplicates were eliminated to yield the final sum of 161 documents. Of these, 152 were opinions in cases up to 1901; there were 9 more references to Vattel in cases between 1905 and 1934. A search of modern Supreme Court opinions after 1945 in the SCT directory revealed 8 citations to Vattel, with 3 references in cases decided in 1997 and 1998: apparently, Vattel is coming back into vogue. A cursory inspection of the cases indicates that of the 169 references, at least 29 were maritime or admiralty prize cases involving ships, 13 involved disputes between states, 9 concerned suits between a state and a private party, 1 between a state and an Indian tribe, and at least 5 addressed Congress's immigration powers. Among the cases in which Vattel was mentioned are some of the great cases of the early Supreme Court such as *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812), *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), and *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). See also FRANCIS STEPHEN RUDDY, *INTERNATIONAL LAW IN THE ENLIGHTENMENT: THE BACKGROUND OF EMMERICH DE VATTTEL'S LE DROIT DES GENS* 284 (1975) (citing research of Professor Edwin Dickinson indicating that between 1789 and 1820, Vattel was cited 92 times in pleadings, 38 times in Supreme Court opinions, and directly quoted in 22 Supreme Court opinions).

¹³⁸ Another popular eighteenth-century writer on the law of nations who is now virtually unknown was Jean Jacques Burlamaqui, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27-29 (1967), who was mentioned in 17 Supreme Court cases before 1945.

¹³⁹ WHARTON, *UNITED STATES REVOLUTIONARY DIPLOMATIC CORRESPONDENCE* 64 (1889), cited in Abraham C. Weinfield, Comment, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?*, 3 U. CHI. L. REV. 453, 458 (1936).

¹⁴⁰ See Albert de Lapradelle, *Introduction to EMMERICH DE VATTTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUES A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOVERAINS* [THE LAW OF NATIONS, OR PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS] iii, xxix-xxx (James Brown Scott ed., Carnegie Inst. of Wash. 1916) (1758) (published as part of *The Classics of International Law* series).

cluding Justices Iredell¹⁴¹ and Wilson read), but the first English translation had been published in 1759,¹⁴² and by the time of the Constitutional Convention in 1787, another English edition and nine French-language editions had been published.¹⁴³ Long before the printing of the first American edition in New York in 1796¹⁴⁴—coincidentally, only months prior to the establishment of the Tazewell Commission to update Congress on the status of the States' ratification of the Eleventh Amendment and the Bill of Rights¹⁴⁵—the frequency of reference to Vattel's book in early American letters, newspapers, and pamphlets indicates that the book was widely available and a leading work in the canon of early American political theory and rhetoric.¹⁴⁶ At least one famed Antifederalist (and therefore protective of state sovereignty) was a particularly avid fan: "Vattel's authority was so great before the courts that prior to arguments before the federal circuit court in Richmond in 1790, Patrick Henry did not hesitate to send his grandson 60 miles on horseback to look for the work that could permit him to win over the judges."¹⁴⁷

It is easy to see why the Framers would have looked frequently to Vattel's *Law of Nations* for statebuilding advice. Certainly, they must have identified closely with the ideas and experience of a Swiss philosopher of law and politics, the citizen of a thriving federated republic. And as a practical matter, the book was structured as an eminently readable handbook on

¹⁴¹ I am indebted to Judge Whichard for this information.

¹⁴² Lapradelle, *supra* note 140, at lviii.

¹⁴³ *Id.* at lvi–lix.

¹⁴⁴ *Id.* at lviii. American editions after the first proliferated in rapid-fire succession; this Article cites from the fourth American edition published in Northampton, Massachusetts in 1820, published a scant 23 years after the first. There were at least seven more American editions published in the nineteenth century, the most significant being Joseph Chitty's new translation first printed in London in 1833 and in America in 1844. *Id.* at lviii–lix. The Chitty translation was reprinted eight times between 1854 and 1872. However, the popularity of the book waned thereafter—the last American printing was the Carnegie Endowment for International Peace's reprint of the 1758 original French edition in 1916. *Id.*; see also HENKIN ET AL., *supra* note 136, at xxv–xxvi (noting Vattel's decline in popularity after World War I). Similarly, Vattel was mentioned in only 10 Supreme Court cases after the end of World War I and then never as the primary authority for a rule of decision as in some eighteenth and nineteenth century cases. See *supra* note 137; Lapradelle, *supra* note 140, at xxxvii.

¹⁴⁵ See *Eleventh Amendment*, in 5 DOCUMENTARY HISTORY, *supra* note 51, at 601. New York had ratified the Amendment on March 27, 1794. See *id.* at 625.

¹⁴⁶ James Wilson was especially fond of Vattel, citing him in his correspondence, his comments at the state and federal ratifying conventions, his opinions, and his instructions to grand juries. See 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 454 (Jonathan Elliot ed., 1861) [hereinafter 2 ELLIOT]; Weinfeld, *supra* note 139, at 459; James Wilson, Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania (July 22, 1793), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 125, at 414–23 (citing Vattel eight different times, Blackstone's *Commentaries* but twice, in his charge to the grand jury empanelled in connection with the Citizen Genet affair).

¹⁴⁷ Lapradelle, *supra* note 140, at xxxvi (footnote omitted) (author's translation).

how a state should deal with day-to-day foreign and domestic governance problems.¹⁴⁸ It was thus starkly different from any of the predominantly theoretical and exposition-oriented political works of the time.

Vattel's influence on American understanding and judicial decisions touching on substantive international law has already been documented by legal scholars.¹⁴⁹ Significantly, this included Vattel's pronouncements on the nature of sovereignty in the society of nations.¹⁵⁰ One account of the Delphic force that Vattel's pronouncements had on early American leaders, at the same time the Eleventh Amendment was being discussed in state legislatures across the nation, is particularly illuminating:

During the cabinet meeting [in mid-April 1793 concerning courses of action with respect to mounting hostilities between Britain and France] Hamilton, in arguing that the turmoil in France and in Europe gave the United States grounds to suspend the treaties [of alliance and commerce with France], appealed to the authority of Vattel. Jefferson was not swayed by the citation, but it did cause Edmund Randolph, the attorney general, to reconsider his opposition to Hamilton's proposal. Unfortunately, a copy of Vattel's work was not available at the moment and the meeting soon adjourned, in part so that the law-of-nations authorities could be consulted.¹⁵¹

But the Supreme Court has also taken guidance and cited from Vattel in decisions that did not implicate the substantive law of nations at all such as cases involving the proper exercise of eminent domain¹⁵² and the sover-

¹⁴⁸ See RUDDY, *supra* note 137, at 285-310 (attributing Vattel's appeal to his readable style, his rationalist method, his relevant discussion of the law of nations in action, and his systematic treatment of topics of interest). As Ruddy points out, the absence of ponderous citations and quotations that made Vattel so readable did not meet the approval of all lawyers. *Id.* at 303-04.

¹⁴⁹ See JAMES KENT, COMMENTARY ON INTERNATIONAL LAW 36 (1878) ("[Vattel's book] has been cited more freely than that of any other public jurist, and is still the statesman's manual and oracle."); DANIEL GEORGE LANG, FOREIGN POLICY IN THE EARLY REPUBLIC: THE LAW OF NATIONS AND THE BALANCE OF POWER 95 (1985) (noting that Hamilton called Vattel "perhaps the most accurate and approved of the writers on the law of nations" (citation omitted)); Jay, *supra* note 17, at 823 ("In ascertaining principles of the law of nations, lawyers and judges [in eighteenth century America] relied heavily on continental treatise writers, Vattel being the most often consulted An essential part of a sound legal education consisted of reading Vattel, Grotius, Pufendorf, and Burlamaqui, among others.").

¹⁵⁰ See DANIEL GARDNER, A TREATISE ON INTERNATIONAL LAW (1844). Gardner justified the United States' recognition of the Republic of Texas as a sovereign nation after its independence from Mexico by offering that such conduct was consistent with Vattel:

Vattel, B. 1st, Ch. V, S. 69, speaking of sovereignty being inherent in a nation and not in a prince or executive says, 'Every true sovereignty is unalienable in its nature,' and he denies that a prince or any national officers can, without a special authority, assign a nation's sovereignty to another, as the nation alone can do it.

Id. at 100-01; see also Lapradelle, *supra* note 140, at xxxvii-xxxviii.

¹⁵¹ LANG, *supra* note 149, at 88.

¹⁵² See *United States v. Jones*, 109 U.S. 513, 518-19 (1883) (citing Vattel for the proposition that "[t]he power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and . . . requires no constitutional recognition.").

eign's plenary powers over immigration and deportation.¹⁵³ As already noted, for example, Vattel was specifically referenced twice in the case of *Chisholm v. Georgia*,¹⁵⁴ which had nothing to do with international law. Moreover, just as this Article argues that the conceptualization of state sovereignty in Vattel's work is the basis of the States' sovereignty as understood in the Eleventh Amendment, other scholars have argued that the difference between "treaties" and "agreements or compacts" as specified in Article I, Section 10 similarly originates in Vattel.¹⁵⁵ There is also a fascinating resemblance between governance concerns that Vattel alone articulated among principal political writers of his time and specific provisions of the Constitution. For example, Vattel's objection to quartering soldiers in private homes in peacetime bears an uncanny likeness to the Third Amendment,¹⁵⁶ and his lengthy discourse on "titles and honours" accorded

¹⁵³ See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893):

The statements of leading commentators to the law of nations are to the same effect.

Vattel says: "Every nation has the right to refuse to admit a foreigner into the country, when he cannot enter without putting the nation in evident danger, or doing it a manifest injury. What it owes to itself, the care of its own safety, gives it this right; and, in virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner." "Thus, also, it has a right to send them elsewhere, if it has just cause to fear that they will corrupt the manners of the citizens; that they will create religious disturbances, or occasion any other disorder, contrary to the public safety. In a word, it has a right, and is even obliged, in this respect, to follow the rules which prudence dictates."

Id. at 707–08 (citing VATTEL, Bk. 1, ch. 19, §§ 230–31, apparently, the Chitty edition of 1879).

¹⁵⁴ Justice James Wilson, the author of the longest and most famous of the majority opinions, was very familiar with Vattel's work, and actually referenced him in his opinion as standing for the proposition that "every state, which governs itself without any dependence on another power, is a sovereign state." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 n.(a) (1793). As discussed *infra* Part III, Wilson admitted that although Georgia may indeed be such a state, popular sovereignty resided in its citizens, who in ratifying the national Constitution, had granted the Supreme Court the power to decide the case in its capacity as the supreme national tribunal. *Chisholm*, 2 U.S. (2 Dall.) at 457. In terms of the theoretical framework of this article, Wilson's reasoning represents the position that the national project should be privileged over the international project with respect to the decision of state-alien contract disputes of the sort in *Chisholm*. Edmund Randolph, the U.S. Attorney General in 1793 and a colleague of Wilson's on the Committee of Detail at the Constitutional Convention, quoted from Vattel on an unrelated point in his arguments on behalf of *Chisholm* before the Court. *Chisholm*, 2 U.S. (2 Dall.) at 428 ("Is not a state capable of making a promise? Certainly; as a state is a moral person, being an assemblage of individuals, who are moral persons. Vat. B.1 s.2.").

¹⁵⁵ See I ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 1A, app. at 310 (1803) (assuming that the Constitution simply adopted Vattel's definition of "agreement or compact" in Article III, Section 10, clause 3); Weinfeld, *supra* note 139, at 460–64 ("It is my contention that the 'agreement or compact' mentioned in the Constitution is the 'agreement convention, compact' described in [Book II, Chapter XII, Sections] 153 and 192 of Vattel.").

¹⁵⁶ Vattel wrote: "When the soldier is not in the field, there is a necessity of quartering him. This burden falls on house keepers; but as it is attended with many inconveniences to the people, it becomes . . . a wise and equitable government, to ease them of it as far as possible." VATTEL, *supra* note 25, at 363 (Bk. III, Ch. II, § 11). The Third Amendment reads: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be pre-

to a sovereign by citizens and other nations¹⁵⁷ harkens to the prophylactic Title Clause of Article I.¹⁵⁸

Vattel's extensive discussion of water rights is perhaps most illustrative of his instructive value and enormous influence on the jurisprudence of the new republic. The doctrinal consequence of England's insular and predominantly nonriverine geography was a drought of common law on conflicting State claims to bodies of water or land-abutting bodies of water that have changed their flow. Of course, such border disputes were commonplace among the early American states and the cause of much interstate strife. In the absence of common-law precedents, the early Supreme Court sometimes drew rules of decision exclusively from Vattel's book. For example, in the seminal water rights' case *Handly's Lessee v. Anthony*,¹⁵⁹ Justice Marshall resolved a border dispute between Indiana and Kentucky concerning land along the Ohio River by applying Vattel's rule that if "the country which borders on a river, has no other limits than the river itself, . . . it enjoys the right of alluvion."¹⁶⁰ Indeed, Justice Marshall so valued Vattel's authority that he did not feel the need to cite any other cases or authorities to justify the holding in this case that was the literal wellspring of the Supreme Court's riverine water-rights jurisprudence.¹⁶¹

It is ironic given the current Supreme Court's general refusal to accord deference to international court adjudications¹⁶² that this body of Supreme Court jurisprudence, so important to the federal system of the fledgling re-

scribed by law." U.S. CONST. amend. III.

¹⁵⁷ See VATTEL, *supra* note 25, at 211-14.

¹⁵⁸ "No Title of Nobility shall be granted by the United States; And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. CONST. art. I, § 9. Vattel wrote: "If the conductor of the state is sovereign, . . . he may himself ordain what title and honours ought to be paid him, *unless the fundamental laws have determined them . . .*" VATTEL, *supra* note 25, at 211 (emphasis added).

¹⁵⁹ 18 U.S. (5 Wheat.) 374 (1820).

¹⁶⁰ *Id.* at 379-380.

"In case of doubt," says Vattel, "every country lying upon a river, is presumed to have no other limits but the river itself; because nothing is more natural than to take a river for a boundary, when a state is established on its borders; and wherever there is a doubt, that is always to be presumed which is most natural and most probable."

"If," says the same author, "the country which borders on a river, has no other limits than the river itself, it is in the number of territories that have natural or indetermined limits, and it enjoys the right of alluvion."

Any gradual accretion of land, then, on the Indiana side of the Ohio, would belong to Indiana, and it is not very easy to distinguish between land thus formed, and land formed by the receding of the water.

Id. (citing VATTEL, *supra* note 25, at 180-81 (Bk. I, Ch. XXII, § 267)); see also *Oklahoma v. Texas*, 260 U.S. 606, 646-47 (1923) (citing the same rule from Vattel).

¹⁶¹ *Handly's Lessee*, 18 U.S. (5 Wheat.) at 379-80; cf. Lapradelle, *supra* note 140, at xxxv-xxxvi (listing instances in the history of the early Republic in which a citation to Vattel carried the day with respect to the resolution of important constitutional issues).

¹⁶² See, e.g., *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam) (denying certiorari).

public, was grounded in the writings of a foreign philosopher of international law and relations. In a fascinating case of historical feedback, the U.S. Supreme Court's water rights jurisprudence, refined over time in the crucible of sensitive interstate border disputes, now constitutes a primary source of international law in transnational water rights cases.¹⁶³ This feedback reminds us that interstate water and boundary disputes, notwithstanding their adjudication in the American national Supreme Court, were and continue to be analytically indistinguishable from international disputes. Consequently, it was only natural for the early Court to turn to international law to decide such cases. And just as the early Court looked to international law and specifically to Vattel for guidance as to the interpretation and execution of its judicial power to decide water rights cases under the "State-State" and "land grant" jurisdictional headings of Article III, Section 2, it seems reasonable that the drafters of the Eleventh Amendment similarly looked to international law for insight into how to protect the sovereign dignity of States involved in interstate and international disputes.

III. FITTING THEORY TO EVIDENCE

Part II made the argument that the Constitution, in appropriate situations, contemplates the exercise of federal power in a way that treats the States as separate sovereign nations, and presented evidence that the founding generation was knowledgeable of the law of nations and routinely imported its rules in these situations. Part I explained why the literal language of the Eleventh Amendment is consistent with the theory that the Amendment applied the international law rule that individuals without a claim to the sovereignty of a State (whether because they are citizens of other States or citizens or subjects of foreign states) have no legal rights against the State. This Part surveys evidence as to how the Eleventh Amendment specifically, and state sovereign immunity more generally, were understood by the founding generation. The unsurprising conclusion is that the Eleventh Amendment seems to have been taken to mean exactly what it says in the late eighteenth and early nineteenth centuries, and that the concepts of sovereign equality and dignity underlying the international rule similarly informed the Framers' idea of state sovereign immunity.

As an initial matter, there is no "smoking gun" evidence that the Constitution barred private suits against the States, nor that it explicitly authorized them.¹⁶⁴ Advocates of the federal-question immunity and diversity theories—having dismissed the language as a valid reference to meaning—have turned instead to different sorts of largely circumstantial evidence to support their explanations of the Amendment. Once again, only a modest

¹⁶³ See, e.g., *Case Concerning Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 WL 1693057 (I.C.J. Dec. 13, 1999). This opinion cites *Vermont v. New Hampshire*, 289 U.S. 593, 619 (1933), which in turn cites *Handly's Lessee*, see *id.* at 603, 606, 615.

¹⁶⁴ See Fletcher, *A Historical Interpretation*, *supra* note 14, at 1071–72.

summary highlighting the most importance pieces of evidence seems appropriate, as the literature on both sides is rich and thorough and it would be pointless to say much more.

A. Evidence for the Federal-Question Immunity Theory

Advocates of the federal-question immunity theory rely generally on three types of evidence. First, they present rhetoric in *The Federalist* and ratification debates by renowned Federalists responding to Antifederalist concerns about the States' sovereignty with language implying that the Constitution intended absolute immunity from private suits for unconsenting States.¹⁶⁵ Second, they refer to the hostile reaction to the *Chisholm* decision and the rapidity with which the Eleventh Amendment was drafted and enacted in response as proof that *Chisholm* had misconstrued the proper scope of state sovereign immunity that the Eleventh Amendment was intended to restore.¹⁶⁶ The inference, of course, is that the symptoms and cure were too drastic to believe that the disease was something as trivial as a technical misunderstanding about diversity jurisdiction (that States could not be defendants in diversity suits brought by private parties). Third, they refer to the sovereign immunity of the British crown as probative of a common-law rule of absolute sovereign immunity that the States inherited.¹⁶⁷

All of this evidence is consistent with the international law theory and with a literal reading of the Eleventh Amendment; most of it is actually better explained by it. Regarding statements about the sovereign immunity of States from private suits by James Madison, Alexander Hamilton, and John Marshall, *all* such references were delivered in the context of debates about Article III's grant of jurisdiction as to "controversies . . . between a State and Citizens of another State." Their comments, in the *Federalist Papers* and at the federal Constitutional Convention and state ratifying conventions, addressed the proposed State-noncitizen diversity provision of Article III only, *not*, as the constitutional immunity theorists imply, the "arising under" heading which might encompass suits brought by a State's own citizens, or as to a heading that simply did not exist providing for jurisdiction as to "controversies between a State and Citizens of another State *or of the State*." John Marshall, for instance, noted:

¹⁶⁵ See, e.g., *Alden v. Maine*, 527 U.S. 706, 716–18 (1999) (citing such statements in *The Federalist* No. 81 (Alexander Hamilton) and comments to the same effect at the Virginia ratifying convention by James Madison and John Marshall); *Seminole Tribe v. Florida*, 517 U.S. 44, 54, 69, 70–71 nn.12–13 (1996).

¹⁶⁶ See, e.g., *Alden*, 527 U.S. at 719–27 (characterizing the reaction of the States to the *Chisholm* decision as "a profound shock" that inspired immediate drafting and near-unanimous support of the Eleventh Amendment to correct its perceived affront to state sovereignty); see also WARREN, *supra* note 51, at 96–102.

¹⁶⁷ See, e.g., *Alden*, 527 U.S. at 715 ("When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts.").

*With respect to disputes between a state and citizens of another state, its jurisdiction has been decried with unusual vehemence. . . . It is not rational to suppose that the sovereign power shall be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a State cannot be defendant. . . . It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff.*¹⁶⁸

Of course, the centerpiece of this sort of historical evidence presented by federal-question immunity advocates is Alexander Hamilton's self-professed "digression from the immediate subject of this paper" in *Federalist* 81:¹⁶⁹

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.¹⁷⁰

As with the oft-quoted comments by Marshall, it is readily apparent that Hamilton's "digression" addressed only and specifically the case of noncitizens suing sovereign States. To begin, he prefaced the quoted passage by saying: "It has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securi-

¹⁶⁸ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555–56 (J. Elliot ed. 1836) (emphasis added).

¹⁶⁹ The passage figures prominently in both the *Seminole Tribe* and *Alden* majority opinions. See *Alden*, 527 U.S. at 716–17; *Seminole Tribe*, 517 U.S. at 54, 69, 70–71 nn.12 & 13.

¹⁷⁰ THE FEDERALIST NO. 81, at 487–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

ties.”¹⁷¹ Since it was then understood that the suability of a sovereign state was a matter of the state’s own local laws, “the general sense and the general practice of mankind” can only be a reference to the practice of the law of nations, under which a noncitizen lacked direct recourse for the violation of contractual rights by a sovereign state, but would have to depend on his own sovereign state for vindication of his rights by legal or other means, including “waging war against the contracting State.”¹⁷²

Of course, the international law theory’s sovereign equality principle supplies a powerful and precise justification for the “unusual vehemence” that the State noncitizen jurisdictional heading inspired among critics that is wholly independent of the unduly broad and statist inference that the federal-question immunity proponents have drawn. As previously noted, whether the judicial power would extend to a suit arising under federal law against a State and brought by its own citizens is a different and much more difficult question that was possibly not even contemplated by the Framers because of its problematic fit with the canonical political theory of wholly exclusive spheres of federal and state sovereignty.

The same criticism can be leveled with as much force against the second sort of evidence presented by the *Alden* majority—evidence of the “profound shock” hypothesis.¹⁷³ That there was a violent reaction to *Chisholm* is certainly true as an historical matter, and the federal-question immunity advocates are correct to see this as a powerful critique of the diversity theory’s admittedly more technical interpretation. But once again, they seem to be drawing an overbroad inference from the facts. That is to say, why is it necessary to conclude, from the quick and swift reaction of the States and the terse, carefully chosen language of the constitutional amendment that resulted, that the sense of outrage was directed at the thought that a State had been haled into federal court by a mere individual, rather than outrage at the notion that one South Carolinian could sue in federal court for money from the sovereign people of Georgia? It seems the broader proposition—that even a *Georgian* had no claim to the money in Georgia’s treasury (for instance, to recoup taxes he believed to have been garnished unfairly)—might have been considered a far less outrageous claim, even in those days. The latter conclusion seems equally, if not clearly more consistent with this evidence of a strong public outrage, the facts of the case in *Chisholm*, and, of course, the language of the Eleventh Amendment.

Evidence of the British Crown’s immunity at common law is interesting from an historical point of view and is also consistent with the international law theory’s proposition that the sovereign may be subject to private causes of action only for fundamental or constitutional violations (for ex-

¹⁷¹ *Id.* at 487.

¹⁷² *Id.*

¹⁷³ “The decision fell upon the country with a profound shock.” WARREN, *supra* note 51, at 96.

ample, those involving taxation or the taking of property without just compensation). To the extent that the sovereign enjoys immunity from common-law as opposed to constitutional claims (Justice Iredell's point in the *Chisholm* dissent),¹⁷⁴ the international law theory is in full accord. And as a matter of political theory, preeminent sovereignty in Great Britain resided in Parliament at the time, so the proper analogy would be whether Parliament, not the King, could be subject to suit for money damages. As the Framers justified the American Revolution itself largely on the basis of what they considered lawful grievances by sovereign citizens against Parliament for taxation without adequate representation, it seems strange, if not wholly inconsistent, that they would think that citizens with a stake in a State's sovereignty would have no lawful right of recourse in the courts with respect to money that they themselves had contributed to the State's treasury.

B. Evidence for the Diversity Theory

Proponents of the diversity theory also rely on history to contest the notion that there was consensus as to state sovereign immunity;¹⁷⁵ they too present three general types of affirmative evidence. First, they point to the fact that state immunity was never truly absolute in the constitutional scheme, as Article III expressly granted federal jurisdiction over suits against States brought by other States, by other nations, and implicitly, by the United States.¹⁷⁶ Second, they emphasize the limitations on the States placed by the Constitution, which they impute to an intent to protect the citizens (in whom sovereignty rightly reposed) from State over-reaching—an intent that would be contradicted by the denial of private remedies to victimized citizens.¹⁷⁷ Third, they refer to statements in post-Amendment Supreme Court decisions before *Hans v. Louisiana*¹⁷⁸ that “are consistent with an interpretation of the Eleventh Amendment as merely narrowing the jurisdiction of the state-diversity clause.”¹⁷⁹ In addition, Judge Fletcher, in a response to Professors Massey and Marshall, has raised a number of objections to the literal interpretation of the Amendment based on historical evidence which need to be addressed.¹⁸⁰

The fact that Article III allows suits against States by other States, foreign states, and the United States is fully consistent with, and indeed compelled by, the sovereign equality principle in a way that it would not be

¹⁷⁴ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435 (1793).

¹⁷⁵ See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 102–09, 142–58 (1996) (Souter, J., dissenting).

¹⁷⁶ See, e.g., Fletcher, *A Historical Interpretation*, *supra* note 14, at 1072.

¹⁷⁷ See, e.g., Amar, *supra* note 14, at 1427.

¹⁷⁸ 134 U.S. 1 (1890).

¹⁷⁹ Fletcher, *A Historical Interpretation*, *supra* note 14, at 1084.

¹⁸⁰ Fletcher, *The Diversity Explanation*, *supra* note 14, at 1276–89; see also *Seminole Tribe*, 517 U.S. at 109–16.

under the diversity theory. Allowing such suits is the affirmative “yin” to the negative “yang” of the proscription of any such suits by citizens of other States or citizens or subjects of foreign states. That is to say, if the Eleventh Amendment fully tracked the language of Article III’s “State-foreign” diversity clause and proscribed suits by “foreign States, Citizens, or Subjects,” (as the current doctrine now holds) it would be inconsistent with the sovereign equality principle; although it would *not* pose problems at all for the diversity theory.

The second sort of evidence—a concern for the rights of the people vis-à-vis the States—is also consistent with the international law theory, which, however, takes a more nuanced view by suggesting that this concern had to be balanced with a respect for the States’ sovereignty and that the exercise of judicial power over suits against States brought by noncitizens was one area in which the compromise worked to the benefit of the States. Moreover, while the argument of protecting individual rights is persuasive with respect to noncitizens who were still citizens of the United States, it is not clear why the rationale should apply to foreign citizens or subjects, and, accordingly, why the Amendment fails to make any distinction between noncitizens who are citizens of other States and those who are not.

Finally, while it is true that the diversity interpretation is more consistent with early post-Eleventh Amendment Supreme Court pronouncements than the federal-question immunity theory,¹⁸¹ the international law theory is quite clearly the most consistent. In every case in which the applicability of the Eleventh Amendment was at issue during his tenure, Justice Marshall stuck by the Amendment’s literal language and declared it inapplicable to suits brought by citizens against their own States and by foreign states, notwithstanding the current doctrine’s contrary position in both instances.¹⁸² In *Cohens v. Virginia*,¹⁸³ for example, the Court affirmed a Virginia state court conviction of Virginians who sold, in Virginia, District of Columbia lottery tickets that Congress had authorized for sale in the District but which state law prohibited.¹⁸⁴ In so doing, Marshall rejected Virginia’s argument that the Eleventh Amendment applied because the case, before the Court on a writ of error from the state court, was not a “suit” within the

¹⁸¹ Compare *Hans v. Louisiana*, 134 U.S. 1, 20 (1890) (“It must be conceded that the last observation of the Chief Justice does favor the argument of the plaintiff [that the Eleventh Amendment does not apply to in-state citizens].”), with Fletcher, *A Historical Interpretation*, *supra* note 14, at 1086 (“Marshall’s statement [in *Osborn v. Bank of United States*] is carefully limited to out-of-state and foreign citizens. But it is possible to read the statement to mean only that federal courts could not entertain such suits without more—that is to say, without some basis for jurisdiction other than the alignment of the parties.”).

¹⁸² See *Hans*, 134 U.S. at 10–11 (extending the Eleventh Amendment’s bar to suits against states brought by its own citizens); *Monaco v. Mississippi*, 292 U.S. 313, 331–32 (1934) (holding the Eleventh Amendment to prohibit suits against states brought by foreign states).

¹⁸³ 19 U.S. (6 Wheat.) 264 (1821).

¹⁸⁴ *Id.* at 404.

meaning of the Amendment,¹⁸⁵ and alternatively, because the defendants were Virginia citizens and the Amendment only applied to suits brought by "Citizens of another State, or by Citizens or Subjects of any Foreign State."¹⁸⁶ In *Osborn v. Bank of the United States*,¹⁸⁷ Marshall clarified that the Amendment was limited to its plain language—to suits against States, not state officers,¹⁸⁸ brought by "citizens of other States, or aliens."¹⁸⁹ In *Cherokee Nation v. Georgia*,¹⁹⁰ he yet again showed his commitment to the Amendment's plain meaning in assuming that if the Cherokee Nation were a foreign state, the Amendment would not bar its suit against Georgia.¹⁹¹

As previously discussed, the international law interpretation would not preclude Supreme Court appellate jurisdiction over state-court decisions because the Court in such cases would be acting in its "national function" capacity as court of last resort in a hierarchical judicial system with respect to the interpretation of the supreme law of the land,¹⁹² rather than as a mediator of first instance in cases involving the sovereign States. This is fully consistent with the first half of Marshall's construction of the Eleventh Amendment in *Cohens*, which, unlike his literal interpretation of its party status requirement, remains good law.¹⁹³ It also explains the Marshall Court's failure to even mention the Eleventh Amendment in *Worcester v. Georgia*,¹⁹⁴—a case in which the Court overturned a state court decision in a suit brought by a noncitizen against the State of Georgia—a party alignment that a strict reading of the Amendment would appear to prohibit.¹⁹⁵ Similarly, in *Ex parte Madrazo*,¹⁹⁶ Marshall assumed the Eleventh Amendment would not apply to a case before the Court exercising its admiralty jurisdiction¹⁹⁷—a form of jurisdiction that seems to have been exempted from

¹⁸⁵ *Id.* at 407.

¹⁸⁶ *Id.* at 412 (quoting the Eleventh Amendment).

¹⁸⁷ 22 U.S. (9 Wheat.) 738 (1824).

¹⁸⁸ *See id.* at 857–58.

¹⁸⁹ *Id.* at 847 ("The eleventh amendment of the constitution has exempted a State from the suits of citizens of other States, or aliens . . .").

¹⁹⁰ 30 U.S. (5 Pet.) 1 (1831).

¹⁹¹ *See id.* at 16 ("May the plaintiff sue in [this court]? Is the Cherokee nation a foreign state in the sense in which that term is used in the constitution?").

¹⁹² *See* *Hans v. Louisiana*, 134 U.S. 1, 19 (1890).

¹⁹³ *See* *McKesson Corp. v. Div. of Alcohol, Beverages & Tobacco*, 496 U.S. 18, 31 (1990) ("The Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts."). Although *McKesson* was a unanimous decision, before *Alden*, it seemed an inconsistent position for the Justices inclined to the federal-question immunity interpretation, insofar as it would have allowed a private party to make an end-run around the Eleventh Amendment (as they understood it) by suing an unconsenting State in state court on a federal claim and then appealing to the Supreme Court (rather than suing the State in a federal court in the first instance).

¹⁹⁴ 31 U.S. (6 Pet.) 515 (1832).

¹⁹⁵ *See id.* at 562; *see also* *Gibbons*, *supra* note 12, at 1953–55 & n.353.

¹⁹⁶ 32 U.S. (7 Pet.) 627 (1833).

¹⁹⁷ *Id.* at 632; *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED

the Amendment's coverage by its limitation to "any suit in law or equity." However, Marshall held that the Amendment did apply to the specific facts in *Madrazzo*, where in rem admiralty jurisdiction did *not* lie because the property at issue was not before the court or in the custody of a private party.¹⁹⁸

Diversity explanation advocates have read *Madrazzo* to stand for the broader proposition that the Marshall Court believed the Eleventh Amendment inapplicable to federal question and admiralty claims.¹⁹⁹ But the conflation is unwarranted, most prominently because of the literal language of the Amendment, but also, on a more practical level, because (as Justice Iredell had noted) admiralty cases involved uniquely external sovereignty issues where it was important for the courts of the United States to speak in one voice, whereas federal-question cases could involve internal sovereignty issues in an interstate context where due respect for the States' sovereignty had to be counter-balanced.²⁰⁰ Regardless, however, the current doctrine is that the Eleventh Amendment bars private in personam suits against the States in admiralty.²⁰¹

The question whether the international law interpretation would hold the Eleventh Amendment to apply in admiralty cases (it would, but the answer is not as clear as the literal language suggests) is an interesting one—consideration of which might clarify misperceptions about how that interpretation works. The adjudication of admiralty and maritime law disputes was clearly a national function of an external sovereignty orientation given that "maritime commerce" was "the jugular vein of the Thirteen States,"²⁰² and, in this sense, it would have seemed proper to have accorded the federal courts a broad jurisdictional grant unencumbered by the Eleventh Amendment. As Hamilton put it in *Federalist* 80:

The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations and so commonly affect the rights

STATES 561 (1833) ("[A] suit in the admiralty is not, correctly speaking, a suit in law, or in equity; but is often spoken of in contradistinction to both.").

¹⁹⁸ *Madrazzo*, 32 U.S. (7 Pet.), at 632; accord *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 494–95 (1998).

¹⁹⁹ See, e.g., Gibbons, *supra* note 12, at 1961. ("[C]areful examination of [the *Madrazzo*] opinions in light of their complex legal and factual context demonstrates that the Marshall Court did not intend to apply the eleventh amendment to actions brought under federal question or admiralty jurisdiction as opposed to federal-party status jurisdiction.").

²⁰⁰ See *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 97–98 (1795) (Iredell, J.).

²⁰¹ See *Ex parte New York*, No. 1, 256 U.S. 490, 502 (1921) (holding that the Eleventh Amendment barred in personam admiralty jurisdiction in a suit brought by private parties against a New York official).

²⁰² "Maritime commerce was then the jugular vein of the Thirteen States. The need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention ." FELIX FRANKFURTER & JAMES LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 7 (1927).

of foreigners that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present Confederation, submitted to the federal jurisdiction.²⁰³

At the same time, *interstate* admiralty disputes were not uncommon,²⁰⁴ and it may have seemed prudent to constrain the potential for offending the States in such cases by foreclosing private plaintiff suits against the States in admiralty. Moreover, admiralty law has its roots in the actual substantive law of nations,²⁰⁵ in which individuals were effectively nonentities and all rules were trumped by the sovereignty principle.

But in the end, the international law interpretation supports the conclusion that States retained no sovereign immunity over suits in admiralty (consistent with the language of the Eleventh Amendment), but more as a matter of practice than theory. That is to say, the vast majority of admiralty cases in the eighteenth and early nineteenth centuries were in rem, and an admiralty court could only exercise its in rem jurisdiction with respect to property actually before it or in the custody of private persons.²⁰⁶ Under these circumstances admiralty suits against States would have been rare, as *Madrazzo* demonstrated,²⁰⁷ and while Justice Iredell and the jurists of his time who were involved in drafting the Eleventh Amendment might have realized that such suits were possible, they probably thought them unlikely.²⁰⁸ And in the few cases that might come along where the defendant State had presumably voluntarily turned over the disputed property to the custody of the admiralty court (thereby signaling a threshold willingness to compromise), Marshall may have been correct in believing the Eleventh Amendment should have no effect.

C. *Literal Interpretation Critiques*

In defending the diversity explanation, Judge Fletcher has presented evidence to critique the previous literal interpretations offered by Professors Massey and Marshall—criticisms that, if valid, would be equally damning to the international law theory. First, he marshals an attack on the claim to the proper plain meaning of the text, by arguing that the Amendment could just as easily be read as limited just to the two diversity headings of Article III (State-Citizen of another State; State-Foreign State, Citizen, or Subject), rather than as “a party-based *denial* of jurisdiction that sweeps across all the

²⁰³ THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁰⁴ See Fletcher, *A Historical Interpretation*, *supra* note 14, at 1078–80. Recall, for example, the dispute between Massachusetts and New Hampshire citizens over proceeds from a prize ship at issue in *Penhallow*. See *Penhallow*, 3 U.S. (3 Dall.) at 60–63.

²⁰⁵ See *Penhallow*, 3 U.S. (3 Dall.) at 97.

²⁰⁶ See *Madrazzo*, 32 U.S. (6 Pet.), at 632; *United States v. Bright*, 24 Fed. Cas. 1232, 1236 (C.C.D. Pa. 1809).

²⁰⁷ See *Madrazzo*, 32 U.S. (6 Pet.), at 632.

²⁰⁸ See *Bright*, 24 Fed. Cas. at 1236.

jurisdictional heads of Article III.”²⁰⁹ To support the assertion, he points to a constitutional amendment proposed (but never enacted) in 1805 by Senator Breckenridge of Kentucky, which stated:

The judicial power of the United States shall not be construed to extend to controversies between a State and citizens of another State, between citizens of different states, between citizens of the same State, claiming lands under the grants of different States; and between a State, or the citizens, thereof and foreign States, citizens, or subjects.²¹⁰

Fletcher points out that the opening of Breckenridge’s amendment—“the judicial power shall not be construed to extend” is identical to the opening phrase of the Eleventh Amendment, and convincingly argues that Breckenridge’s amendment was intended solely to eliminate the diversity jurisdiction.²¹¹ He concludes that, since Breckenridge’s amendment is “to our ear linguistically deficient in the same way as the Eleventh Amendment,” however strange it might seem to us now, it may have been reasonable to have drafted the Amendment as it was written while still intending to repeal only the State-citizen and State-foreign diversity heads of jurisdiction.²¹²

Judge Fletcher’s ingenious argument ultimately fails because Breckenridge’s proposed amendment tracks *word-for-word* the last three “controversies” headings in Article III and could therefore be read, as plainly now as in 1805, as intending to wipe out those three diversity heads alone. Consider the language of the Eleventh Amendment by comparison: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” Note again the use of “any suit in law or equity” as opposed to “controversies” and the conscious omission of “foreign State.” Further proof of the broader party-based nature of the Eleventh Amendment proscription by comparison to the Breckenridge amendment is evident in the use of other language—“commenced or prosecuted against one of the United States”—that is not present at all in Article III. Comparing the two amendments to Article III side by side, then, Judge Fletcher’s argument does little to undermine the conclusion that what the Eleventh Amendment most plainly seems to say now was what it was originally meant to say, as Justice Marshall believed.

To set the context of Judge Fletcher’s other important criticism of the literal language explanation, we need to return to what is both the greatest insight afforded by the diversity theory and its greatest weakness. The di-

²⁰⁹ Fletcher, *The Diversity Explanation*, *supra* note 14, at 1276–79.

²¹⁰ 14 ANNALS OF CONGRESS 53 (Feb. 8, 1805).

²¹¹ Fletcher, *The Diversity Explanation*, *supra* note 14, at 1277–78.

²¹² *Id.* at 1278–79.

versity theory draws due attention to the fact that the Eleventh Amendment addressed a problem that was specific to a subset of diversity suits—interstate and international interactions between private parties and States. By contrast, *Hans* had crafted a reading of the Amendment that had rendered the fact of diversity irrelevant to its effect. The problem arises, however, in the case of a suit that might be brought under both diversity and federal-question jurisdictions—the issue was not presented by the *Chisholm* suit because there was no federal-question jurisdiction statute at the time, but, as we have discussed, such a statute was certainly a clear possibility. In such a case, under the diversity theory, whether a federal court would have jurisdiction would turn on whether the plaintiff pled diversity or arising-under jurisdiction. A comparative advantage of both the federal-question immunity and international law theories is that the Eleventh Amendment would retain its full force regardless of how a private suit is pleaded.

Indeed, the most damning argument against the diversity interpretation is that *Chisholm*, or any other suit brought by citizens of other States or citizens or subjects of foreign states, to enforce securities or contracts issued by the States, could at least arguably have been brought under the Contracts Clause, perhaps even without a statute under the Supreme Court's original jurisdiction,²¹³ as construed by the Supreme Court in *Fletcher v. Peck*,²¹⁴ seventeen years after *Chisholm*. Justice Wilson apparently thought so at the time that *Chisholm* was decided;²¹⁵ Justice Iredell clearly noted and comprehended the import of Wilson's dictum,²¹⁶ but did not challenge it. Certainly, claims against States brought by English citizens under the Treaty of Paris in 1783 would have properly been brought under the "arising under" jurisdiction, regardless whether Justice Marshall's interpretation of the Contracts Clause in *Fletcher v. Peck* accorded with original intent.²¹⁷ If the Eleventh Amendment meant what the diversity explanation advocates say it means, then it could have been easily circumvented by the passage of a general federal-question jurisdiction statute like the short-lived Judiciary Act of 1801²¹⁸ which purported to authorize federal jurisdiction to the full extent of the Constitution,²¹⁹ and artful pleading to fall within the statute's

²¹³ See *supra* note 55.

²¹⁴ 10 U.S. (6 Cranch) 87 (1810).

²¹⁵ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 465 (1793) ("What good purpose could [the Contracts Clause] secure, if a state might pass a law, impairing the obligation of its own contracts; and be amenable, for such a violation of right, to no controlling judiciary power?"); see also *Moultrie v. Georgia*, in 5 DOCUMENTARY HISTORY, *supra* note 51, at 512 (contemplating Contracts Clause suit by private party against Georgia shortly after *Chisholm* was decided); *supra* note 56 and accompanying text.

²¹⁶ James Iredell, *Notes on the Justices' Opinions* (Feb. 18, 1793), reprinted in 5 DOCUMENTARY HISTORY, *supra* note 51, at 216.

²¹⁷ See WRIGHT, *supra* note 56, at 15–21.

²¹⁸ Act of Feb. 13, 1801, 2 Stat. 89.

²¹⁹ See Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY Q. 3

generous compass.

Judge Fletcher responds to this charge by going on the offensive. He notes that a literal reading of the Amendment would not prohibit the *assignment* of state contracts to *in-state* citizens unspecified by its language; thus, even under a literal meaning, the force of the Amendment could be nullified by strategic litigation.²²⁰ But Section 11 of the Judiciary Act of 1789,²²¹ the "assignee clause," specified that federal courts lacked jurisdiction in "any suit to recover the contents of any promissory note or other chose in action in favour of an assignee unless a suit might have been prosecuted in such court . . . if no assignment had been made."²²² Under the terms of the statute that was then in effect, if the Eleventh Amendment precluded federal jurisdiction over any suits against a State by noncitizens, then assignment to an in-state citizen would not have sufficed to establish it.²²³ Whether or not the assignee clause would have been interpreted at the time to bar assignments to in-state citizens designed to circumvent the Eleventh Amendment, it seems to be a reasonable construction of that statute—one that would have convinced the Amendment's ratifiers that the potential for collusive in-state assignment under the Amendment as drafted would be minimal.²²⁴

D. Justices Iredell and Wilson and the Eleventh Amendment

Before moving on in Part IV to discuss the implications of the international law theory on current Eleventh Amendment doctrine, it seems useful to talk about the *Chisholm* opinions of Justices Iredell and Wilson and more broadly their views on international law and state sovereignty given their importance in the origins of the Eleventh Amendment. Since the conventional view is that the Eleventh Amendment memorialized what Iredell said and meant in his *Chisholm* dissent, the inquiry is valuable for evidentiary reasons to the extent that Iredell's opinion and views are consistent with the international law theory. As important, looking carefully at the writings of

(1965); Erwin C. Surrency, *The Judiciary Act of 1801*, 2 AM. J. LEGAL HIST. 53 (1958).

²²⁰ Fletcher, *The Diversity Explanation*, *supra* note 14, at 1281; Marshall, *supra* note 8, at 1366–67 n.113.

²²¹ 1 Stat. 73, 78–79 (1789). The current form of the statute is 28 U.S.C. § 1359 (1994) which provides: "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." The statute and its predecessors traditionally have been used to prevent collusive efforts to establish diversity jurisdiction by assigning causes of action to qualifying plaintiffs. *See, e.g., Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969). However, the language of the assignee clause does not limit its effect to diversity jurisdiction; it is just that there would be little utility in assigning a claim that qualifies for federal question jurisdiction, other than in the case of assignment to an in-state citizen under the rather unique circumstances of the Eleventh Amendment as read literally.

²²² Section 11, 1 Stat. 73, 79 (1789).

²²³ The possibility of assignment to other States raises interesting problems discussed *infra* Part III.

²²⁴ *Cf. Marshall, supra* note 8, at 1366–67 n.113 (arguing that ratifiers considered collusive assignment to in-state citizens unlikely, without reference to applicability of assignee clause).

these deeply thoughtful members of the founding generation is valuable for what it shows about the way they thought about federalism, state sovereignty, the United States, and their world.

Justices Iredell and Wilson shared a deep respect for the law of nations,²²⁵ but for different reasons, which are reflected in their divergent opinions in *Chisholm*. To Wilson, the law of nations was useful as a means of reinforcing directly the republic's *external* standing in the community of nations,²²⁶ and indirectly, by force of analogy, the binding nature of the republic's laws in the *internal* interstate community of the American people.²²⁷

The institution of the States stood as an impediment to both purposes—as contenders to the collective polity in foreign relations and as alternative coercive authorities in domestic affairs. It is not surprising, then, that Wilson took every opportunity at the federal Constitutional Convention to propose proportional representation in the legislature by popular election,²²⁸ multi-State districting for Senate seats with direct election,²²⁹ or similar ideas that would have rendered the State a distinction without a difference.²³⁰ He sought thereby to marginalize what he perceived to be a way station that had outlived its usefulness on popular sovereignty's flow upstream to the national government.²³¹

But Wilson could not discount the States completely.²³² To do so

²²⁵ Compare *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J.) (“When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”), and James Wilson, Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 125, at 417–20 (“Does a Question arise before [the common law], which properly ought to be resolved by the Law of Nations? By that Law she will decide the Question: For that Law, in its full Extent, is adopted by her. The Infractions of that Law form a Part of her Code of criminal Jurisprudence. . . . The Law of Nations as well as the Law of Nature is of Obligation indispensable: The Law of Nations as well as the Law of Nature is of Origin divine.”), with James Iredell, Charge to the Grand Jury of the Circuit Court for the District of South Carolina, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 125, at 467 (“The Common Law of England, from which our own derived, fully recognizes the principles of the Law of Nations, and applies them in all cases falling under its jurisdiction, where the nature of the subject requires it.”).

²²⁶ See Jay, *supra* note 17, at 839–43.

²²⁷ Cf. James Wilson, Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 125, at 418.

The Law of Nations is the Law of Sovereigns. In free States, such as ours, the sovereign Power resides in the People. In such, therefore, the Law of Nations is the Law of the People. I mean not that it is a Law made by the People, or by their Authority; as, in free States, municipal Laws are made: But I mean, that, like the Law of Nature, it is indispensably binding upon the People

Id.

²²⁸ See 1 FARRAND, *supra* note 95, at 252–55, 367, 449–50.

²²⁹ See *id.* at 148–49, 151, 153–54, 157. Not surprisingly, Wilson's motion was defeated, ten negative votes to his one affirmative.

²³⁰ See *id.* at 324–25.

²³¹ See *id.* at 151, 166–67.

²³² See *id.* at 157.

would contradict the political theory of revolution he had forcefully and quite genuinely advocated during the War of Independence, wherein revolution was justified by virtue of the fact that the several state legislatures, not Parliament, constituted the legitimate locus of popular sovereignty.²³³ Moreover, as a leading citizen of a politically and economically prominent State, it would have been imprudent for him to deny the force and relevance of the State altogether (unless he believed that Pennsylvania's preeminence was such that a strong American republic meant one not only capitated in that State but dominated by it).

In his famous *Chisholm* opinion, Wilson observed that the law of nations was inapplicable, essentially because *Chisholm* was a "national project" case which the sovereign citizens of Georgia had authorized the general government to adjudicate when they ratified the Constitution.²³⁴ Wilson admitted that "according to some writers, [citing Vattel,] every State, which governs itself without any dependence on another power, is a sovereign State."²³⁵ And he conceded that "as a judge in this cause," he could not know "[w]hether, with regard to her own citizens, this is the case of the State of Georgia."²³⁶ But "as a citizen [of the union]" he did presume to know "the government of that state to be republican,"²³⁷ which meant for him a government "constructed on this principle, that the supreme power resides in the body of the people."²³⁸ He thus concluded:

As a judge of this court, I know, and can decide, upon the knowledge, that the citizens of Georgia, when they acted upon the large scale of the Union, as a part of the "People of the United States," did *not* surrender the supreme or sovereign power to that state; but, *as to the purposes of the Union*, retained it to themselves. *As to the purposes of the Union*, therefore, Georgia is *not a sovereign state*. If the judicial decision of this case forms one of those purposes; the allegation that Georgia is a sovereign state, is unsupported by the

²³³ See JAMES WILSON, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*, in 2 THE WORKS OF JAMES WILSON 721 (Robert G. McCloskey ed., 1967) (1774); WOOD, *supra* note 84, at 350-51.

²³⁴ See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 453-66 (1793) (Wilson, J.).

²³⁵ *Id.* at 457. Wilson cites to Vattel, Book I, Chapter I, Section 4, which states in its entirety:

Every nation that governs itself, under what form so ever, without any dependence on foreign power, is a *sovereign state*. Its rights are naturally the same as those of any other state. Such are moral persons who live together in a national society under the law of nations. To give a nation a right to make an immediate figure in this grand society, it is sufficient if it be really sovereign and independent; that is, it must govern itself by its own authority and laws. We ought therefore to reckon in the number of sovereigns, those states that have bound themselves to another more powerful by an *unequal alliance*, in which, as Aristotle says, to the more powerful is given more honour, and to the weaker, more assistance.

VATTEL, *supra* note 25, at 58.

²³⁶ See *Chisholm*, 2 U.S. (2 Dall.) at 457.

²³⁷ *Id.* (referring presumably to the Republican Government Clause).

²³⁸ *Id.*

fact.²³⁹

Wilson's argument carefully avoids a direct challenge to Georgia's sovereignty²⁴⁰ by proposing that adjudicating this particular case—Chisholm's cause of action—was properly a national purpose for which her citizens had allocated sufficient sovereignty to the general government to decide. But he sought to accomplish that very thing by expanding the scope of what was national.

Justice Iredell perceived the importance of the law of nations generally, and its specific applicability by analogy to the issue of State suability in *Chisholm*, in a different light. He agreed with Wilson that faithful adherence to the law of nations was essential to the external legitimacy of a newcomer to the society of nations.²⁴¹ Like Wilson, too, Iredell believed that revolution had been justified when the legislatures of the various States had displaced Parliament as the proper trustees of the people's sovereignty.²⁴²

What distinguished Iredell from his great friend and colleague,²⁴³ however, was the enduring importance that he attached to the brief but vital role that the States had played in their revolutionary capacity. They had been the great enablers of independence by virtue of the legitimacy of their legislatures—institutions that had been entrusted with the will of the people.

²³⁹ *Id.*

²⁴⁰ In this respect, Wilson's opinion was far more deferential to state sovereignty than the impolitic opinion of Chief Justice Jay, who reasoned functionally that there was nothing special about the institution of the state that merited a special immunity from suit. See *Chisholm*, 2 U.S. (2 Dall.) at 469, 472 (Jay, C.J.).

Will it be said, that the fifty odd thousand citizens in Delaware, being associated under a state government, stand in a rank so superior to the forty odd thousand of Philadelphia, associated under their charter, that although it may become the latter to meet an individual on an equal footing in a court of justice, yet that such a procedure would not comport with the dignity of the former?

Id. at 472.

²⁴¹ See, e.g., *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 160–61 (1795) (Iredell, J.).

²⁴² See *Pennhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 90–93 (1795) (Iredell, J.).

²⁴³ Contrary to the impression conveyed by their disagreement in *Chisholm*, Justices Iredell and Wilson were very close friends. As Iredell admitted, their "sentiments in general agree perfectly well." Letter from James Iredell to Hannah Iredell (May 6, 1791), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 125, at 161; see also Letter from James Iredell to Richard Bennehan (Aug. 15, 1794), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 125, at 480 (providing letter of introduction for "my very respectable Friend Judge Wilson"). Indeed, when Wilson was forced into hiding from creditors after disastrous land speculation, Iredell arranged shelter for him in his hometown of Edentown, North Carolina, where, unfortunately, the spy Scotsman Wilson contracted malaria in the sweltering Tobacco Road summer. See Letter from Hannah Wilson to Bird Wilson (July 28, 1798), reprinted in 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 281–82 (Maeva Marcus et al. eds., 1988) [hereinafter 3 DOCUMENTARY HISTORY]. At his bedside upon Wilson's death, Iredell faithfully arranged for his friend's burial on the estate of his father in law. See Letter from James Iredell to Thomas Pickering (Aug. 25, 1798), reprinted in 3 DOCUMENTARY HISTORY, *supra*, at 286 (informing Pickering, Secretary of State, of Wilson's death on August 21, 1798); see also David W. Maxey, *The Translation of James Wilson*, 1990 J. S. CT. HISTORY 29 (1990) (recounting rehabilitation of Wilson's reputation to include ceremonious reburial of his remains in Philadelphia in 1906).

They had, thereby, become "bodies politic" in their own right,²⁴⁴ and this transformation had accorded them a status co-equal to sovereign nations "possessed of all the powers of sovereignty internal and external."²⁴⁵ But rather than go their own ways and thereby fully realize their unquestionable right to be independent nation-states, the people of the States chose to establish a "general government" that would "possess all the incidents to external sovereignty."²⁴⁶ The strong possibility that the general government with its unprecedented and potentially limitless powers, or that the more powerful States—Pennsylvania, New York, Massachusetts, or Virginia (the looming giant to the north of Iredell's beloved North Carolina)—might undermine the complicated structure of this voluntary "surrender,"²⁴⁷ required the erection of an unimpeachable legal baseline that recognized the special status of the States arising from their necessary role in justifying the Revolution and establishing the Constitution.

Iredell understood instinctively and maintained consistently that the best way to protect this special status—the sovereign dignity of the States, was to forge an absolute identity between the sovereignty of the States and the more general, inviolable principle of sovereignty as it was understood in the laws and political theories of nations.²⁴⁸ This special respect for foreign and state sovereignty was a life project of Iredell's tenure on the Court, threaded through his various opinions and grand jury charges, in much the same way that the incorporation of the Bill of Rights to the States was Justice Black's.²⁴⁹ Thus, he resolutely resisted any encroachment on formal

²⁴⁴ See *Pennhallow*, 3 U.S. (3 Dall.) at 94.

[E]very particle of authority which originally resided either in congress, or in any branch of the state governments, was derived from the people, who were permanent inhabitants of each province, in the first instance, and afterwards became citizens of each state; that this authority was conveyed by each body politic separately, and not by all the people in the several provinces, or states, jointly

Id.

²⁴⁵ *Id.* at 92.

²⁴⁶ *Id.* at 94.

²⁴⁷ See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 434 (1793).

²⁴⁸ See *id.* ("Every state in the Union, in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. . . . [O]f course, the part not surrendered must remain as it did before."); *id.* at 446 ("Now, there are, in my opinion, the most essential differences between the old cases of corporations . . . and the great and extraordinary case of states separately possessing, as to everything simply relating to themselves, the fullest powers of sovereignty.").

²⁴⁹ See, e.g., *In re Winship*, 397 U.S. 358, 377 (1970) (Black, J., dissenting) ("The Bill of Rights . . . in my view is made fully applicable to the States by the Fourteenth Amendment."); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (Black, J., dissenting). See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 20–21 (1980) (stating that in *In re Winship*, Justice Black, "pursuing his 'incorporation' theory," refused to read the reasonable doubt standard into the Fourteenth Amendment because it did not appear in the Bill of Rights); MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 91–98 (1998) (stating that Justice Black believed that the protections afforded by the Bill of Rights was incorporated into the Fourteenth Amendment's Due Process Clause).

legal distinctions that accorded special respect for sovereign states, foreign or domestic, and he sought to design the doctrine in a way that brooked no distinction between the two types of sovereigns.

The most notable example of this philosophy is Iredell's resilient stance on the exclusivity of the Supreme Court's original jurisdiction in cases involving ambassadors and the States as parties. As the circuit justice in *Chisholm*, Iredell held that the Supreme Court's original jurisdiction was exclusive in cases where States were parties.²⁵⁰ He also hewed to an ultra-strict construction of the international law rule regarding the plenipotentiary status of ambassadors, insisting that haling the "Public Agent" of a foreign sovereign into a federal court other than the Supreme was an inexcusable affront to sovereign dignity.²⁵¹ He was apparently the only Justice in the history of the Court, indeed the only federal judge with recorded opinions, to have believed this.²⁵²

It was natural, then, for Iredell to accept and to apply the corollary rule of sovereign equality to the American context, denying the legitimacy of private action in interstate and international suits against States.²⁵³ Given his belief in the identity and mutually reinforcing nature of sovereignty in its State and nation-state incarnations, the consequences of the obverse rule would be disastrous for the republic both internally and externally. On the international level, given the republic's foreign war debts, many to private creditors, foregoing the rule would operate in one direction only, against the interests of the United States. Moreover, the conviction that individual action in interstate relation could only cause trouble was reinforced at the time by the American public furor over "Citizen Genet," the French minister who schemed to incite the United States to violate its neutrality and declare war on Great Britain.²⁵⁴ On the domestic level, a departure from the sovereign equality principle to recognize noncitizen rights against States would effect a similarly skewed benefit for the wealthier, more populous States against the relatively poorer, sparsely populated States like North Carolina—inequalities in fact to which the ideal of sovereignty was impervious. It was in this sense that Iredell disagreed with Wilson and understood "The Conventional Law of Nations" to apply to the *Chisholm* case.²⁵⁵

But just as Wilson was unwilling to go so far as to deny any special status to state sovereignty (though this may have been his intent),²⁵⁶ Iredell

²⁵⁰ See *Farquhar v. Georgia* (C.C.D. Ga. 1791) (Iredell, J.), reprinted in 5 DOCUMENTARY HISTORY, *supra* note 51, at 154.

²⁵¹ See *United States v. Ravara*, 2 U.S. (2 Dall.) 297 (C.C.D. Pa. 1793).

²⁵² See HART & WECHSLER, *supra* note 1, at 297.

²⁵³ See James Iredell, Charge to the Grand Jury of the Circuit Court for the District of South Carolina, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 125, at 467 ("In whatever manner the Law of Nations is violated, it is a subject of national, and not personal complaint.").

²⁵⁴ See Lapradelle, *supra* note 140, at xxxvi.

²⁵⁵ See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 449 (1793).

²⁵⁶ See *id.* at 457 (Wilson, J.).

readily acknowledged that the sovereign dignity of the States could not save them from suit where the alleged violation involved issues over which the people of the various States had legitimately allocated their sovereignty to the general government.²⁵⁷ When a citizen of a State brought such a claim against the State, Iredell's special interstate sovereign dignity concern was not a factor because the plaintiff had a right to sue for violations of fundamental laws as a participant in both levels of sovereignty. That a citizen had a right of recourse to the courts of his sovereign for the violation of a fundamental law was foundational to his understanding of popular sovereignty; the important point of distinction was that, at the time, because of the dogma of mutually exclusive sovereignties, it was difficult to imagine that a suit brought by a citizen against his own State could arise under federal law.²⁵⁸ But when a citizen of another State brought the same claim, the sovereign's dignity interest had to be balanced against the general government's interest in enforcing its fundamental laws, and, it seems likely that Iredell would have maintained that the former should trump the latter, as was the case in the classical law of nations.

Under this interpretation, Iredell's lengthy discourse on the sovereign's immunity from *assumpsit* suits²⁵⁹ cannot be taken to support a broad sense of sovereign immunity. Because, on the facts in *Chisholm*, he had ascertained that there was no claim of a violation of fundamental laws, he sensibly avoided the tough constitutional question and found his answer in the common law (under which the sovereign was immune).²⁶⁰ In this sense, he would have reached the same decision if the action had been brought by a citizen against his own State or against the United States, in state or federal court—in all these cases, his political theory of sovereignty would not have required a private remedy.

But had the case been brought by an out-of-state U.S. citizen (as distinct from a foreign citizen or subject) as one "arising under the Constitution," a violation of the fundamental laws would have been pleaded, and Iredell would have been forced to have reached the same result on the sovereign dignity interest alone, if unable to persuade his colleagues that the case did not state a constitutional claim. In that event, Iredell's focus on the absence of controlling congressional authorization by statute in *Chisholm* suggests that he might have considered the sovereign dignity interest ade-

²⁵⁷ See *id.* at 435–36 (Iredell, J.).

²⁵⁸ See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398 (1798) (Iredell, J.) ("If any act of congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case.").

²⁵⁹ See *Chisholm*, 2 U.S. (2 Dall.) at 437–46; see also John V. Orth, *The Truth About Justice Iredell's Dissent in Chisholm v. Georgia* (1793), 73 N.C. L. REV. 267–68 (1994).

²⁶⁰ See *Chisholm*, 2 U.S. (2 Dall.) at 449 ("[I]t is of extreme moment, that no judge should rashly commit himself upon important questions, which it is unnecessary for him to decide.").

quately protected by legislative federalism.²⁶¹ That is to say, he may indeed have permitted the suit, but only if Congress had passed an enabling federal-question jurisdiction statute.

If, by contrast, a sovereign state, whether one of the United States, the United States, or a foreign state, had brought the suit against Georgia, either as a common-law or a federal-law claim, Iredell's formulation of the issues—consistent with the international law theory—would have led him to have decided that jurisdiction was proper, absent a collusive assignment to the plaintiff State in violation of the assignee clause. As under the law of nations, the crucial factor in determining whether jurisdiction in a supreme supra-state tribunal was proper in a suit against a state would be whether or not the plaintiff party was itself a co-equal state.

If the controversy had in fact occurred among nation-states, the traditional law of nations would have recognized the legality of the offended state's resort to war as the ultimate option should all else fail.²⁶² In the American interstate context, this option was specifically foreclosed by Article I's restrictions on the States' warrmaking powers,²⁶³ but this did not mean that a frustrated State might not decide to take matters in its own hands if denied fair adjudication of the issue in contest. Such a war would have doomed the union, as Iredell, the dedicated Federalist,²⁶⁴ well understood. Accordingly, he sought first to validate the powers of the general government in its external functions,²⁶⁵ thereby faithfully executing the Court's "national" functions of enforcing the consensus that the Constitution had embodied as to external affairs, and reinforcing political, social, and economic bonds among the States in the process. At the same time, unlike Wilson, he was ever mindful of the Court's vital "international" function as a safety valve to deal with those few interstate disputes that could not be resolved by political or other means.

This interpretation of Justice Iredell's *Chisholm* opinion and his understanding of state sovereignty reconciles three inconsistencies that alternative explanations have failed to address. First, although some have character-

²⁶¹ See *id.* at 432 ("This appears to me to be one of those cases, with many others, in which an article of the constitution cannot be effectuated, without the intervention of the legislative authority."). But see *id.* at 449 ("[M]y present opinion is strongly against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against a state for the recovery of money.").

²⁶² See Vattel, *supra* note 25, at 355 (Bk. II, Ch. XVIII, § 354) ("But if from particular conjectures, and from the obstinacy of an unjust adversary, neither reprisals nor any of the methods of which we have been treating, are sufficient for our defence, and for the protection of our rights, there remains the unhappy and sad resource of war. . .").

²⁶³ See U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

²⁶⁴ See Orth, *supra* note 259, at 266 ("[Iredell's] reputation has suffered from the need to incorporate a supposedly restrictive reading of the Constitution in *Chisholm* into a life story otherwise plainly Federalist.").

²⁶⁵ See *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 95 (1795).

ized Iredell as a States' rights activist,²⁶⁶ he was a steady Federalist: a force behind North Carolina's ratification of the Constitution,²⁶⁷ loyal to the Federalist administrations of Washington and Adams, and a proponent of nationalist sentiments in the corpus of his opinions and correspondence.²⁶⁸ Second, the perception that Iredell favored the absolute immunity of the States from private suits is inconsistent with his support for judicial review²⁶⁹ and his resolute belief in popular sovereignty.²⁷⁰ Third, as the diversity advocates have pointed out,²⁷¹ the narrow ground of Iredell's actual holding on the "particular question . . . [of whether] an action of *assumpsit* lie against a state"²⁷² is inconsistent with broad statements about the constitutional nature of any immunity that he recognized on the facts in *Chisholm*. If, as the *Hans* Court and many others have argued, the Eleventh Amendment did indeed memorialize Iredell's dissent,²⁷³ then the congruence between its rationale and his general beliefs, and the principles and rules of the law of nations, supports the international law interpretation of the Amendment.

IV. DOCTRINAL PRESCRIPTIONS: THE INTERNATIONAL LAW EXPLANATION APPLIED

The question to be answered in this Part is the practical one of what should be done about the current law of state sovereign immunity in light of the international law explanation. It seems prudent at the start to distinguish those prescriptions of the theory, most importantly, the notions that consent would be insufficient to waive immunity and that the States should not enjoy immunity as to in personam admiralty suits, which are either so contrary to existing doctrine or of such minor importance that further discussion seems unwarranted. The present discussion, rather, focuses on three aspects in which the implications of the international law theory appear to diverge from the state of the law that seem both important to the

²⁶⁶ See, e.g., 1 GRIFFITH J. MCREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 381-82 (Peter Smith New York 1941) (1857).

²⁶⁷ See Orth, *supra* note 259, at 267; Willis P. Whichard, *James Iredell, in* *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* 198, 206-10 (Scott Douglas Gerber ed., 1998).

²⁶⁸ See Whichard, *supra* note 267, at 210-11.

²⁶⁹ See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J.) ("If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case."); *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 412 (1792) (representation to President of the United States of Iredell, Circuit Justice) ("[N]o decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the constitution, be liable to a revisions, or even suspension, by the legislature itself . . .").

²⁷⁰ See *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 93-94 (1795).

²⁷¹ See, e.g., Fletcher, *A Historical Interpretation*, *supra* note 14.

²⁷² *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 430 (1793).

²⁷³ See *Hans v. Louisiana*, 134 U.S. 1, 13-14 (1890).

core principles of the theory and useful in understanding it. These relate to the doctrine of congressional abrogation by legislation to enforce the Fourteenth Amendment, the related doctrines of espousal of private claims by sovereign states and suits brought by foreign states, and the doctrines of state sovereign immunity in the courts of the State and other States.

A. *The International Law Explanation and Congressional Abrogation*

While the doctrine of congressional abrogation, briefly discussed in subpart II.B, appears on its face to be in tension with the international law explanation, the inconsistency disappears upon closer scrutiny, by virtue of the enactment of the Fourteenth Amendment. This is because the normative component of the international law theory contemplates suits by a State's own citizens for violations of "fundamental laws"—an issue on which the language of the Eleventh Amendment, given its "international" orientation, is understandably silent. The power of state citizens to sue their States for fundamental violations was extended to all citizens of the United States by Sections 1 and 5 of the Fourteenth Amendment.

Section 1 states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens of the United States* and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens of the United States*; nor shall any State deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws.²⁷⁴

Section 5 declares that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."²⁷⁵ The language of Section 1 effectively cleaves the Eleventh Amendment's implicit equivalence between U.S. citizens who are "Citizens of another State" and "Citizens or Subjects of any Foreign State." Among the "privileges or immunities of citizens of the United States" which the States may not abridge, is the right to sue States for violations of fundamental laws of the United States.

In this sense, the Fourteenth Amendment, enacted in the wake of the secession of the Southern States and the Civil War, represents, as the federal-question immunity advocates also acknowledge, a recalibration of the relative balancing of national and international project goals vis-à-vis the branches of the federal government, including the judiciary.²⁷⁶ As citizens

²⁷⁴ U.S. CONST. amend. XIV, § 1 (emphasis added).

²⁷⁵ U.S. CONST. amend. XIV, § 5.

²⁷⁶ See *Alden v. Maine*, 527 U.S. 706, 756 (1999) ("By imposing explicit limits on the powers of the States and granting Congress the power to enforce them, the Amendment 'fundamentally altered the balance of state and federal power struck by the Constitution'" (citing *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996))); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). It does not necessarily follow, however, that any congressional legislation passed pursuant to constitutional provisions predating the

of the United States, those with a claim to national sovereignty were thereby granted standing equivalent to those of citizens of the States to sue a State not their own for violations of fundamental national laws. Current doctrine defines these violations by reference to legislation to enforce the Fourteenth Amendment, which makes sense, but the international law theory would add to the list all federal constitutional violations. Stated differently, the Fourteenth Amendment "incorporates" the right to sue a sovereign State for transgressions of fundamental law to all U.S. citizens in a manner not unlike the way in which Justice Black argued that it "incorporated" the Bill of Rights to the States.

By contrast, the Amendment explicitly does not extend this privilege to those who are not "citizens of the United States." Whether the subset of noncitizens—those "Citizens or Subjects of any Foreign State," who nevertheless fall within the definition of "any person" set forth in the Due Process or Equal Protection Clauses of the Fourteenth Amendment, such as, for example, permanent resident aliens under certain circumstances—are entitled to a similar right to sue States for fundamental violations is a tough question that is better left for another day. What is clear, however, is that the Eleventh Amendment retains full effect vis-à-vis "Citizens or Subjects of any Foreign State" who do not count as "persons" under the Fourteenth Amendment.

B. Suits Against the States by Foreign States and the Doctrine of Espousal

A second, more enduring way in which doctrine shaped according to the international law interpretation would diverge from the current law of state sovereign immunity concerns the extension of the Eleventh Amendment bar to suits against States brought by foreign states, an extension that ignores the clear import of the Amendment's text, which was confirmed by early decisions of the Supreme Court. For example, the Marshall Court stated in *Cherokee Nation v. Georgia*²⁷⁷ that a foreign state's ability to sue a State was unaffected by the Amendment.²⁷⁸ But although the Supreme Court has upheld State suability with respect to other States²⁷⁹ and the

Civil War may not abrogate the sovereign immunity of the States, as the doctrine presumes. Certainly, as this Article has already noted, *see supra* subpart II.B, a convincing argument could be made that a fundamental reordering of the federal government's authority as to the States should result in greater power under prior constitutional provisions as well. But that argument has been better made by others and is beyond the scope of this Article.

²⁷⁷ 30 U.S. (5 Pet.) 1 (1831).

²⁷⁸ *See id.* at 15–16.

²⁷⁹ *See, e.g.,* *Colorado v. New Mexico*, 459 U.S. 176, 182 n.9 (1982) ("Because the State of Colorado has a substantial interest in the outcome of this suit, New Mexico may not invoke its Eleventh Amendment immunity from federal actions by citizens of another State."); *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) ("[A]n original action between two States only violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to specific individuals."); *Kansas v. Colorado*, 206 U.S. 46, 83 (1907) ("[The Eleventh Amendment] refers only to suits and actions by individuals, leaving undisturbed the jurisdiction over suits or actions by one State against another.").

United States,²⁸⁰ it expressly concluded in 1934, in the case of *Principality of Monaco v. Mississippi*²⁸¹ that the “same fundamental principle” that sanctioned extension of the Amendment’s bar to suits by a State’s own citizens in *Hans* supported state immunity from suits brought by foreign nations.²⁸² The unanimous decision in *Monaco* was additionally justified by the policy concern of interference in the federal government’s conduct of foreign relations.²⁸³

The *Monaco* Court’s decision was not only more clearly inconsistent with the Eleventh Amendment’s text (the Amendment says “Citizens or Subjects of any Foreign State where Article III had clearly enumerated “foreign States, Citizens, or Subjects”) and early Supreme Court precedent than *Hans*, it also neglected the compelling sovereignty-related reasons for the Amendment’s design. It did so, first, by undermining the Eleventh Amendment’s implicit and powerful statement about the equal status and dignity of the sovereignty of the States as compared to that of nation-states—the equivalence that Iredell perceived as central to unity within the republic.²⁸⁴ Second, it created a new and potentially dangerous “right-remedy” gap with respect to the capacity for individual aliens to obtain relief for wrongs committed by the States. The Eleventh Amendment proscribed direct suits by foreign citizens or subjects—often from powerful creditor nations like Britain and France—on the assumption that aggrieved foreigners could appeal to their states for political, economic, and diplomatic intercession, which the sovereign state by undertake on behalf of its citizens if warranted by national interests.²⁸⁵ Indeed, the absence of a forum

²⁸⁰ See, e.g., *United States v. Mississippi*, 380 U.S. 128, 140 (1965) (“[N]othing in . . . the Constitution prevents or has ever been seriously supposed to prevent a State’s being sued by the United States.”); *United States v. Texas*, 143 U.S. 621, 642 (1892) (“[The Supreme Court] has original jurisdiction of a suit by the United States against a State.”).

²⁸¹ 292 U.S. 313 (1934) (unanimous opinion).

²⁸² *Id.* at 329–30. Professor Monaghan has argued that the *Seminole Tribe* Court should have considered the possibility that Congress could abrogate Florida’s Eleventh Amendment immunity with respect to Indian tribes, whose sovereign status logically seems to be somewhere between that of states who can sue other states, and foreign states, who cannot under *Monaco*. See Henry Paul Monaghan, *The Sovereign Immunity “Exception,”* 110 HARV. L. REV. 102, 116–17 (1996). This is an intriguing argument, but it seems to contradict the significance, if not the letter, of the holding in *Cherokee Nation*, which expressly denied that tribes were “foreign states” for jurisdictional purposes, but also implicitly assumed that they did not qualify as States for federal jurisdiction purposes. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16–20 (1831).

²⁸³ See *id.* at 331–32.

²⁸⁴ See *supra* Part III.

²⁸⁵ See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 259 (1796) (Iredell, J.).

When any individual, therefore, of any nation, has causes of complaint against another nation, or any individual of it, not immediately amenable to the authority of his own, he may complain to that power in his own nation, which is entrusted with the sovereignty of it, as to foreign negotiations, and he will be entitled to all the redress which the nature of his case requires, and the situation of his own country will enable him to obtain.

Id.

for mediation might prove disastrous for interstate peace, as the traditional law of nations recognized the right of nations to go to war to vindicate just claims.²⁸⁶

The logic of espousal becomes complicated in the context of the domestic United States, however, because of the presence of the federal government and multiple state governments, each of which could potentially be sued by States or by foreign nations on behalf of their respective citizens. In the domestic interstate context, permitting noncollusive espousal in the federal courts acting as mediators would seem to benefit national harmony and to present a welcome alternative to the constitutionally prohibited sanction of State-initiated war,²⁸⁷ in order to afford redress to out-of-state U.S. citizens who have been seriously injured by other States. One could even argue that it is the responsibility of the sovereign agents in a republican state to prosecute such claims to the best of their ability. But the law does not recognize such a right of States to interstate espousal.²⁸⁸ The prohibition is inconsistent with the Eleventh Amendment's design, but, in practice, mitigated by the Fourteenth Amendment's grant of co-equal privileges or immunities to all citizens of the United States, which permits the out-of-state U.S. citizen to sue a State directly for violations of statutory laws enacted to enforce the Fourteenth Amendment under the current doctrine, and for constitutional violations under the international law theory.

With respect to State-foreign state lawsuits, the *Monaco* Court presumed that a net benefit to the conduct of the nation's foreign affairs would accrue from an exclusive allocation of associated responsibilities to the executive and legislative branches of the national government. This instinct, though perhaps reasonable, is not only inconsistent with the design and text of the Eleventh Amendment, it may also result in impediments to the conduct of foreign affairs in situations where the national executive and legislature are powerless for political reasons to bend the States to policies that would nevertheless be in the national interest. The federal courts, in their mediating international governance capacity, could prove to be a useful institution in such circumstances.

This particular problem loomed large to the leaders of the young repub-

Miserable and disgraceful, indeed, would be the situation of the citizens of the United States, if they were obliged to comply with a treaty on their part, and had no means of redress for a non-compliance by the other contracting power.

But they have, and the law of nations points out the remedy. The remedy depends on the discretion and sense of duty of their own government.

Id. at 260.

²⁸⁶ See VATEL, *supra* note 25, at 348-49 (Bk. II, Ch. XVIII, §§ 338-40).

²⁸⁷ U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit delay.").

²⁸⁸ See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) ("[A]n original action between two States only violates the Eleventh Amendment if the plaintiff State is actually suing to recover injuries to specific individuals." (citing *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258-59 n.12 (1972))).

lic, supervising a brood of powerful and unruly States that had independently and collectively incurred significant contractual and treaty obligations to foreign nations. Effective conduct of relations with foreign powers—at the very least, the deterrence of war—counseled the provision of credible rights to remediation for treaty violations in the federal courts. Conveniently, the recent case of *Breard v. Greene*²⁸⁹ reminds us that this dilemma persists today.

In *Breard*, a Paraguayan national was arrested, convicted, and sentenced to death by a Virginia court for attempted rape and murder.²⁹⁰ During his detention, he was not informed about his right to notify Paraguayan consular officials under Article 36 of the Vienna Convention on Consular Relations;²⁹¹ nor did state officials inform the Paraguayan consulate as required by a U.S.-Paraguay bilateral treaty.²⁹² A federal district court rejected Paraguay's subsequent diversity suit seeking vindication of these claims, finding, *inter alia*, that "the Eleventh Amendment bars suits by a foreign government against a state government in federal court."²⁹³ The Fourth Circuit affirmed²⁹⁴ and Virginia scheduled Breard's execution for April 14, 1998.

On April 3, Paraguay began proceedings against the United States in the International Court of Justice, which promptly issued a provisional order instructing the United States to "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings."²⁹⁵ The Supreme Court denied certiorari, citing, *inter*

²⁸⁹ 523 U.S. 371 (1998) (*per curiam*).

²⁹⁰ See *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1271 (E.D. Va. 1996).

²⁹¹ Article 36, entitled "Communication and contact with nationals of the sending State," provides:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officials shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communications with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody, or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposed such action.

Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 78, 100-01.

²⁹² Treaty of Friendship, Commerce and Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091.

²⁹³ *Allen*, 949 F. Supp. at 1272.

²⁹⁴ See *Republic of Paraguay v. Allen*, 134 F.3d 622, 629 (4th Cir. 1998).

²⁹⁵ Application of the Vienna Convention on Consular Relations (Para. v. U.S.) Provisional Measures, para. 37 (Order of Apr. 9, 1998) (unanimous ruling) (on file with author).

alia, the Eleventh Amendment bar articulated in *Principality of Monaco v. Mississippi*.²⁹⁶ Nonetheless, the State Department asked the Virginia governor to postpone Breard's execution fearing that the perception that the United States took its Vienna Convention obligations lightly might inspire retaliations against Americans abroad.²⁹⁷ The plea fell on deaf ears, however, and Breard was executed by lethal injection on April 14, 1998 as scheduled.²⁹⁸

Presuming that Paraguay alleged a cause of action under the bilateral treaty (which was another issue), affording Paraguay a forum in the federal courts given Virginia's intransigence vis-à-vis the executive branch would have benefited the United States's conduct of its foreign affairs in light of the State Department's position. The case vividly elucidates the structural deficiency of a political system in which a general government must manage States with policies and goals that might conflict with national priorities. As the Framers realized, the courts could productively supplement the national executive and the legislature in the pursuit of national interests in such circumstances. Although the nature of these institutions—the States, the federal executive, Congress, the federal judiciary, and even the content and scope of fundamental rights—has evolved, the structural strengths and infirmities of the system have persisted. By foreclosing the option of foreign states turning to the federal courts, the Supreme Court may not only have misconstrued the Eleventh Amendment, it may also have unwisely upset the capacity of the system to face external and internal sovereignty problems that have similarly endured.

C. State Sovereign Immunity in State Courts

A final category of differences worth mentioning between the international law explanation and the doctrine concerns state sovereign immunity in state courts. Although the Eleventh Amendment does not expressly address the suability of the States in state courts, one can infer from the sovereignty principle underlying the international law interpretation that States should not be subject to private suits in the courts of other States, contrary to the holding in *Nevada v. Hall*.²⁹⁹ Immunity against private suits in the courts of other States is thus one respect in which the international law theory would call for a broader scope of state sovereign immunity than the doctrine presently permits.

²⁹⁶ 292 U.S. 313, 329–30 (1934); see *Breard v. Greene*, 523 U.S. 371, 379–81 (1998) (Justices Stevens, Ginsburg, and Breyer dissenting from denial of certiorari).

²⁹⁷ See William J. Aceves, *International Decision: Application of the Vienna Convention on Consular Relations* (Paraguay v. United States), 92 AM. J. INT'L L. 517, 522 & n.31 (1998).

²⁹⁸ See *id.* at 522.

²⁹⁹ 440 U.S. 410, 426–27 (1979); see also John M. Rogers, *Applying the International Law of Sovereign Immunity to the States of the Union*, 1981 DUKE L.J. 449, 476 (arguing that international law principles should be applied to state sovereign immunity in the courts of other of the United States).

As for private suits against States in their own courts, the same sovereignty principle would permit private suits for the redress of fundamental laws or statutes enacted under Section 5 of the Fourteenth Amendment. This is consistent with the actual holding in *Alden v. Maine*,³⁰⁰ where individuals claimed that Maine had violated the overtime provision of the Fair Labor Standards Act,³⁰¹ which was enacted under Congress's Article I commerce powers.³⁰²

Of course, *Alden* also stands for the larger proposition that "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution."³⁰³ This statement is certainly consistent with the international law theory of the Eleventh Amendment, but *Alden* misconstrues the nature of this foundational immunity. The State was entitled to dignity in its treatment by the federal courts because, as a republican state, it represented the collective will of its many citizens and was therefore entitled to immunity when faced in those courts with the money claims of an individual who had no claim to that sovereignty. At the same time, it was necessary to balance this dignity against the interests of union because the State was itself embedded in a system of federated republican states, which was in turn situated in a world of competitive nation-states that further complicated the treatment of state sovereignty within the twice nested system.

It is no surprise, then, that suits against the States by private parties for money damages did arise in sufficient numbers to suggest that there was no consensus as to whether such suits were permitted by the Constitution, or more generally, whether such suits were consistent with the political system that the founding generation sought to construct.³⁰⁴ It is significant in this respect that two powerful mid-Atlantic States—New Jersey and Pennsylvania—refused to ratify the Eleventh Amendment.³⁰⁵ And given this uncertainty about the suability of States, it seems imprudent to believe there was any sense that the States' immunity from any and all private suits for money damages, particularly suits brought by state citizens who had a claim to the public fisc, was a fundamental aspect of sovereignty. In the law of nations as understood by Vattel, Kant, and Iredell, absolute sovereign immunity from private suit did constitute a fundamental aspect of sovereignty, but only in the limited category of interstate suits. By contrast, immunity from *citizen* claims of fundamental law violations was no part of sovereignty in

³⁰⁰ 527 U.S. 706 (1999).

³⁰¹ Fair Labor Standards Act of 1938, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201–219 (1994 & Supp. III)).

³⁰² See *Alden v. Maine*, 527 U.S. 706, 731 (1999).

³⁰³ *Id.* at 713.

³⁰⁴ See *Introduction* to 5 DOCUMENTARY HISTORY, *supra* note 51, at 1–5 (noting that there were eight private suits against States in addition to *Chisholm* that were litigated to some degree in the 1790s).

³⁰⁵ See *id.* at 603 & n.31; JACOBS, *supra* note 1, at 181.

republican states, the form of government that the Guarantee Clause aimed to secure for the citizens of the States for all time, where sovereignty itself resided in the citizenry.

V. CONCLUSION

Imagine that a British citizen, without consulting her government or seeking its state-to-state diplomatic and political intercession, brings suit in a putative lower court (with a Canadian judge) of the International Court of Justice against the United States. Her complaint alleges that the U.S. government's failure to pay just compensation for the seizure of her house in the Hamptons for use as a former presidents' rest home constituted a violation of international law and the Fifth Amendment. For the purposes of the hypothetical, assume that the International Court's statute is ambiguous as to the permissibility of aliens suing sovereign states, that the people of the United States had unanimously agreed to the Court's general jurisdiction on terms identical to Article III as a condition to membership in a "world general government" to fight the Martians, and that the claim alleged a colorable violation of both international and American constitutional law.

The diversity explanation would hold jurisdiction improper only as to the domestic constitutional law claim. The federal-question immunity theory would find jurisdiction repugnant as to both claims, indeed any claims against the United States, notwithstanding the United States' ratification of the general government's constitution. Justice Iredell would argue that the defects of significance would be that one self-interested alien had brought the claim against a country of many, and that the United States would be subjected to the indignity of having the case tried initially by one subordinate member of the international judiciary organ. Which of these conclusions would most accurately reflect the reasons why such jurisdiction would be distasteful to all Americans?

Though fanciful, the hypothetical has heuristic force in illuminating the particular constitutional issues the Eleventh Amendment was intended to address. The Amendment addressed not only a technical legal question, but, as both Wilson and Iredell noted, a more important political philosophical question with respect to the nature of sovereignty that was fundamental to the American union of states. Viewed in these terms, the federal-question immunity theory goes too far, the diversity theory, not far enough. This Article has presented an alternative construction, one based on the law of nations as then understood, that strikes an intermediate balance between the national project of maintaining a viable general government and the international project of preserving independent state identities. The international law interpretation has the additional advantage of explaining, rather than explaining away, a perceived anomaly in the language of the Eleventh Amendment. For Iredell, the Eleventh Amendment's basic prescription, that the judicial power of the general government "shall not be construed to

extend to any suit in law or equity, commenced or prosecuted against [a State] by Citizens of another State”³⁰⁶ would not have seemed anomalous at all, but rather a concise and accurate statement of the cardinal rule of the law of nations, which he purposefully sought to import to the situation of the States, obligatory by the nature of sovereignty, but mitigated by the promise of republicanism to the States.

To understand the Constitution’s design and intent, it is important to realize that it speaks at times to the States as states and at others as nations. When it contemplates the States as nations in a federated system, it seems only logical that the Founders consulted the law of nations to answer questions of constitutional design. The intuition seems unexceptionable as applied to the distinction between treaties and compacts or to the adjudication of boundary disputes. This Article has argued that the Eleventh Amendment—the authoritative constitutional statement on the sovereignty of the States in a federated system of states—was similarly based upon the law of nations in which the sovereignty of nation-states was positively and normatively supreme and inalienable. To Justice Iredell and the others of his generation who cherished the States’ sovereignty but accepted and indeed embraced the necessity of union, there could be no better guarantee of its permanence than to bind it closely to the law of nations.

For Iredell, then, respecting the sovereign dignity of the States meant according them the same treatment due to foreign nations in the Supreme Court, and in the Supreme Court alone, acting in its international capacity of adjudicating awesome disputes to which the States were party. This included the right to be sued by their peers—other States and foreign states—and by these peers alone, even when a violation of the laws of the general government to which the States were bound was alleged. Deference was due not because the State was a Leviathan that granted its wretched citizens remedies as a matter of grace; Iredell believed that the Constitution’s promise of republican government obligated the States to grant their sovereign citizens remedies when they had violated the fundamental laws of the United States they had pledged to uphold. Rather, as the law of nations recognized, it was because sovereignty itself was the most fundamental law, the *sine qua non* of the system. To acknowledge that a man or a woman who had no claim to that sovereignty could seek relief in the general courts, even for the most egregious violation of the law of nations or the law of the United States (as appropriate), would contradict that most fundamental law and cast the fate of the system into jeopardy.

The Fourteenth Amendment’s ambitious decree, that the citizens of the several States are equally “citizens of the United States” entitled to the same “privileges or immunities” under the laws of the several States, abolished the effect of the Eleventh Amendment with respect to out-of-state U.S. citizens. The power to sue any of the States for violations of the Amendment’s

³⁰⁶ U.S. CONST. amend. XI.

guarantees was thereby vested in all citizens of the United States; the Amendment's vitality with respect to non-U.S. aliens was unchanged, however. The international law interpretation is thus congruent with the current Supreme Court's doctrine of congressional abrogation by exercise of its Section 5 powers. Moreover, if, as argued, a State's own citizens had the right to sue the State for violations of fundamental law, the Privileges or Immunities Clause of the Fourteenth Amendment could be construed as empowering out-of-state U.S. citizens to sue the States for the same.

So, in the end, notwithstanding the sharply divergent explanations of what the Eleventh Amendment means, the international law interpretation would urge departure from the current doctrine in only two significant respects. First, citizens of the United States should be allowed to sue the States in the federal courts for constitutional violations as well as for violations of statutes enacted under Section 5. Second, foreign states and other States that noncollusively espouse the claims of private citizens should be allowed to sue the States in federal court. As a related corollary, the States should not be entitled to sovereign immunity in state courts with respect to federal constitutional claims or claims arising from statutes validly enacted under Congress's Section 5 powers, but they should be entitled to state sovereign immunity in the courts of other States to the same extent as in the federal courts.

Although *this* Article argues that the Eleventh Amendment should be interpreted as it most plainly reads, I do not think the text should always trump in constitutional interpretation. For one, there should be historical evidence to support the literal meaning—the literal interpretation must be consistent with how people thought about the text at and around the time of enactment. Additionally, when, as here, there is an acknowledged divergence between literal meaning and the state of the doctrine, it seems fair to say that a literal interpretation offering prescriptions for doctrinal change ought to make policy sense, both when viewed at the time of enactment and today. Finally, there is the test of principle on which the previous literal theories of the Eleventh Amendment foundered—does the textual interpretation accord with our sense of what is important enough to have warranted constitutional change?

Additionally, it is not clear that *all* constitutional text should be equally privileged *qua* text. It is one thing to say that each of the forty-three words in the Eleventh Amendment, enacted by itself after much debate over five years in every state legislature and in public opinion, was carefully chosen. It is quite another to say that we should assign the same significance to constitutional text that was adopted more hastily and en masse, for instance, the Bill of Rights, or parts of the original Constitution.

Severing the tether to text seems particularly dangerous when the legal concept that is unchained is something as potentially limitless as sovereign

dignity in the sense the *Alden* majority has conjured it.³⁰⁷ To be sure, the international law theory similarly explains the Eleventh Amendment as reflecting the larger principle of sovereign dignity, but it is a dignity that is based on the private citizens who constitute the State, not a dignity that is separate from and superior to its citizens. If, despite the words of the Amendment, it offends *Alden* dignity as much to sue the State in state court as in federal court,³⁰⁸ then how much more the affront to dignity to allow citizens to sue States in administrative tribunals? And, under that same boundless principle of dignity, what should it matter that a citizen's claim against the State is a constitutional one, say a taking, rather than a statutory one? Indeed, how long can the theory of congressional abrogation survive in tension with this principle of dignity; or any of the current exceptions to sovereign immunity doctrine? And how could it possibly be consistent with dignity to allow private suits against States before subordinate magistrates or district judges; should not these suits be brought before the Supreme Court, as Justice Iredell believed?³⁰⁹ The parade of horrors is probably overstated, but, certainly, some limitation on scope is an additional virtue of the text-based international law explanation of the Eleventh Amendment and its implicated dignity interest.

By these standards—text, history, policy, principle, and context—the international law explanation is more convincing than the existing theories; but getting it “right” is neither the only nor the most important goal—indeed, the law of nations itself has evolved with respect to the rights of individuals to sue sovereign states. More important is to recognize that the Founders were thoughtful, innovative people with many intellectual debts and sophisticated world-views. They were not dry, legal formalists enslaved by arcane common-law doctrines; they were blooded revolutionaries and political philosophers of the first rank who had cherished ideals that they sought to implement in a project—the uniqueness and importance of which they were constantly aware. The problem of sovereignty, especially, was one they had struggled with repeatedly—first in the War of Independence, then in the design of the constitutional system, and subsequently in the crucial formative years of that system's existence. Their resourcefulness and open-mindedness should inspire us similarly to be judicious about the lessons of the past, to be more respectful and receptive to the laws and examples of the community of nations,³¹⁰ and to be cautious about letting

³⁰⁷ *Alden*, 527 U.S. at 749.

³⁰⁸ *Id.* at 733, 749.

³⁰⁹ “It may also fairly be presumed that the several States thought it important to stipulate that so awful and important a Trial [to which a State is party] should not be cognizable by any Court but the Supreme.” *Farquhar v. Georgia* (C.C.D. Ga. 1791) (Iredell, J.), reprinted in 5 DOCUMENTARY HISTORY, *supra* note 51, at 154.

³¹⁰ *Cf. Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of certiorari) (“Willingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a ‘decent respect to the opinions of mankind.’”).

our devotion to laws consume our political ideals.